

<p>1 Thursday, 25 June 2015</p> <p>2 (10.30 am)</p> <p>3 Housekeeping</p> <p>4 MRS JUSTICE ANDREWS: Mr George, Ms Cockerill, I have an</p> <p>5 observer in court who is doing some work shadowing.</p> <p>6 I hope neither of you object to that.</p> <p>7 MR GEORGE: My Lady, no.</p> <p>8 MS COCKERILL: Not at all.</p> <p>9 MRS JUSTICE ANDREWS: Yes, Mr George?</p> <p>10 MR GEORGE: My Lady, I appear today for three respondents to</p> <p>11 orders made pursuant to a letter of request received</p> <p>12 from an American court. My learned friend Ms Cockerill</p> <p>13 appears for Vale, who was the requesting party in those</p> <p>14 US proceedings.</p> <p>15 I hope my Lady has received copies of the skeletons</p> <p>16 of both parties?</p> <p>17 MRS JUSTICE ANDREWS: Yes.</p> <p>18 MR GEORGE: And my Lady has received a variety of bundles,</p> <p>19 I am afraid to say, but if my Lady can bear with me,</p> <p>20 I will attempt to make my submissions primarily by</p> <p>21 reference to the blue Farrers bundle, if my Lady has</p> <p>22 that. Can I confirm my Lady has received bundles from</p> <p>23 Sheridans and DWF as well?</p> <p>24 MRS JUSTICE ANDREWS: I have.</p> <p>25 MR GEORGE: And one authorities bundle from me and one from</p> <p style="text-align: center;">Page 1</p>	<p>1 that will not be necessary and I will conduct my</p> <p>2 submissions on that basis.</p> <p>3 Submissions by MR GEORGE</p> <p>4 So my Lady, there are effectively three relevant</p> <p>5 considerations or grounds of objection.</p> <p>6 The first and most important relates to the</p> <p>7 protection of the identity of the sources who provided</p> <p>8 information to my business intelligence consulting</p> <p>9 clients. This is a matter where there is at least some</p> <p>10 measure of common ground that it involves your judicial</p> <p>11 consideration and weighing of a number of competing</p> <p>12 factors. The test is not dissimilar to that my Lady</p> <p>13 would apply in English civil proceedings, where</p> <p>14 redactions were requested on grounds of confidentiality.</p> <p>15 MRS JUSTICE ANDREWS: Yes. You are not alleging that this</p> <p>16 is a publication within the meaning of section 10 of the</p> <p>17 Contempt of Court Act, as I understand it?</p> <p>18 MR GEORGE: The journalist sources point, my Lady, no.</p> <p>19 MRS JUSTICE ANDREWS: Even though the evidence does suggest</p> <p>20 at some point that there are journalist sources</p> <p>21 involved?</p> <p>22 MR GEORGE: Precisely, my Lady. We invite my Lady, in the</p> <p>23 course of considering that balancing exercise, to weigh</p> <p>24 carefully the evidence we have put before the court as</p> <p>25 to the analogies that can probably be drawn with</p> <p style="text-align: center;">Page 3</p>
<p>1 my learned friend. I am very grateful.</p> <p>2 MS COCKERILL: My Lady, that will not have reached you yet.</p> <p>3 That is to be handed up at the appropriate time.</p> <p>4 MRS JUSTICE ANDREWS: No, your skeleton arrived at about</p> <p>5 4 o'clock.</p> <p>6 MS COCKERILL: My apologies for that, it certainly was</p> <p>7 dispatched earlier.</p> <p>8 MR GEORGE: Finally, by way of preliminaries, my Lady, you</p> <p>9 will have seen one observation in my skeleton. There</p> <p>10 are before the court, although not exhibited to any of</p> <p>11 the witness statements, certain confidential reports</p> <p>12 which are relevant to the subject matter of this</p> <p>13 discussion.</p> <p>14 MRS JUSTICE ANDREWS: That I haven't seen.</p> <p>15 MR GEORGE: My Lady, I do not refer to them in my</p> <p>16 submissions and nor does my learned friend and nor do</p> <p>17 I anticipate it will be necessary to go to them.</p> <p>18 MRS JUSTICE ANDREWS: I understand entirely what the</p> <p>19 restraints are.</p> <p>20 MR GEORGE: Precisely.</p> <p>21 MRS JUSTICE ANDREWS: I think we can probably manage without</p> <p>22 looking at them, unless there comes a point in which it</p> <p>23 becomes inevitable.</p> <p>24 MR GEORGE: I am very grateful. If that were to come,</p> <p>25 I would ask for submissions on privacy but I am hopeful</p> <p style="text-align: center;">Page 2</p>	<p>1 journalistic sources, given that the evidence before the</p> <p>2 court does suggest that these people also acted as</p> <p>3 journalists and will have talked to the same sources.</p> <p>4 What I do not have before this court, and I will go</p> <p>5 to the evidence in detail, as it were, is to say that</p> <p>6 the purpose of any particular communication I could rely</p> <p>7 on was journalistic in that sense. But we do say it's</p> <p>8 an important analogy and my Lady will have seen the</p> <p>9 evidence as to why we say that.</p> <p>10 MRS JUSTICE ANDREWS: Not that I want to short circuit your</p> <p>11 submissions, but on reading this application, am I right</p> <p>12 in thinking -- and it may well be that Ms Cockerill is</p> <p>13 best placed to answer this, but I will be interested to</p> <p>14 see what both of you have to say about it: my</p> <p>15 understanding is that Vale made this application for the</p> <p>16 specific purpose of being able to have an argument on</p> <p>17 the limitation point in New York.</p> <p>18 MR GEORGE: That was my --</p> <p>19 MRS JUSTICE ANDREWS: Because the issue was as to whether</p> <p>20 Rio Tinto had the requisite knowledge and the red flags</p> <p>21 and so forth to enable Vale to say: well, you should</p> <p>22 have started proceedings sooner and you're now time</p> <p>23 barred. Rio Tinto, in turn, would say: well, no, we're</p> <p>24 not because we didn't know certain information which was</p> <p>25 essential for us to know at that stage.</p> <p style="text-align: center;">Page 4</p>

<p>1 So the issue to which the disclosure is directed is</p> <p>2 the state of Rio Tinto's knowledge at a particular time,</p> <p>3 or during a particular period. My understanding was</p> <p>4 that that was the specific basis upon which the judge of</p> <p>5 the New York court, Judge Peck was asked to issue the</p> <p>6 letters of request and the purpose for which he granted</p> <p>7 them.</p> <p>8 So there wasn't an application to Judge Peck</p> <p>9 saying: we need to know who the sources are of the</p> <p>10 information that was supplied to Rio Tinto, in order to</p> <p>11 be able to evaluate the quality of that information,</p> <p>12 albeit that that might well be a relevant reason why the</p> <p>13 documents would be of use if the case ever got to</p> <p>14 a substantive fight and got past the limitation point.</p> <p>15 Now, if that is so, and if the sole purpose of the</p> <p>16 letter of request was to enable information to be</p> <p>17 provided to Vale for the purposes of dealing with the</p> <p>18 limitation issue and dealing with the question of Rio</p> <p>19 Tinto's knowledge, then that was the purpose for which</p> <p>20 the learned judge asked the assistance of this court.</p> <p>21 Therefore, although this court does not have the</p> <p>22 power to blue pencil a letter of request, and strike out</p> <p>23 a category of disclosure and substitute its own views as</p> <p>24 to what should be disclosed, when it comes to the</p> <p>25 exercise of discretion, surely if the identification of</p> <p style="text-align: center;">Page 5</p>	<p>1 itself. You will see it is said and I say only said:</p> <p>2 "Magistrate Judge Peck ordered that Vale has a right</p> <p>3 to know the source names on the basis that under US</p> <p>4 discovery rules, a party is allowed to obtain discovery</p> <p>5 regarding any non-privileged matter that is relevant to</p> <p>6 any party's claim or defence, including the identity and</p> <p>7 location of persons who know of any discoverable</p> <p>8 matter."</p> <p>9 If my Lady sees the cross reference, it's to</p> <p>10 page 131 of the exhibit.</p> <p>11 MRS JUSTICE ANDREWS: That's to the rules?</p> <p>12 MR GEORGE: And that's to the rule. My Lady, we looked for</p> <p>13 the transcript in the exhibit and we found at page 167</p> <p>14 of the exhibit there is a transcript but we could find</p> <p>15 nothing to support that statement, and in fact, if one</p> <p>16 looks at line 4 of page 167, the judge makes the</p> <p>17 observations:</p> <p>18 "Give me all your back-ups to the interviews and</p> <p>19 anything else that resulted in this report that might or</p> <p>20 might not pass muster here; if contested, is likely not</p> <p>21 to pass muster in the UK."</p> <p>22 And it has been contested in the UK and that's where</p> <p>23 we are.</p> <p>24 We asked yesterday in correspondence for the full</p> <p>25 transcript of that hearing, which we received, and I can</p> <p style="text-align: center;">Page 7</p>
<p>1 the sources is not actually what the material that's</p> <p>2 asked for is all about, isn't there a short cut?</p> <p>3 MR GEORGE: My Lady, you anticipate, precisely, my</p> <p>4 submission.</p> <p>5 MRS JUSTICE ANDREWS: I spotted the submission in the course</p> <p>6 of your skeleton argument but it just seems to me we</p> <p>7 need to deal with that first because do we really need</p> <p>8 to go into the question of confidentiality? If the</p> <p>9 identity of these people is not material but the</p> <p>10 information is, then I can't see what the problem is.</p> <p>11 MR GEORGE: My Lady, may I make one caveat to that so that</p> <p>12 my learned friend, as it were, can respond because</p> <p>13 I should draw my Lady's attention to paragraph 68 of</p> <p>14 Mr Kelly's second witness statement, which my Lady will</p> <p>15 have, probably, in all three bundles I fear but I am</p> <p>16 using it from --</p> <p>17 MRS JUSTICE ANDREWS: I cannot remember where I put it now.</p> <p>18 MR GEORGE: I have it in the Sheridans bundle, bundle 2,</p> <p>19 where it is, helpfully, a free-standing document --</p> <p>20 bundle.</p> <p>21 It's tab 11 of ARC.</p> <p>22 MRS JUSTICE ANDREWS: I have a DWF bundle. Yes, I put his</p> <p>23 second witness statement in with his exhibits so I have</p> <p>24 it in that bundle. Yes, which page?</p> <p>25 MR GEORGE: Page 333, so page 19 of the witness statement</p> <p style="text-align: center;">Page 6</p>	<p>1 hand up but unless I have missed something there is</p> <p>2 nothing else in there that supports the statement that</p> <p>3 this was specifically ordered on the grounds of</p> <p>4 providing disclosure of the identity of possible further</p> <p>5 witnesses.</p> <p>6 As my Lady will appreciate, even if the judge had</p> <p>7 specifically ordered it on that basis, that is</p> <p>8 specifically impermissible to be provided under a letter</p> <p>9 of request by this English court because it is not</p> <p>10 evidence that is admissible at trial; it is, to quote</p> <p>11 the phrase from the House of Lords decision in</p> <p>12 Westinghouse, evidence that "appears to be reasonably</p> <p>13 calculated to lead to the discovery of admissible</p> <p>14 evidence", perfectly proper in US procedure but not</p> <p>15 permissible under a letter of request.</p> <p>16 So I just make that caveat to my Lady's submissions,</p> <p>17 that one other possibility has been put forward but we</p> <p>18 have seen no evidence to support that that actually was</p> <p>19 in the American court's mind and if it was in the</p> <p>20 American court's mind, it would be an impermissible</p> <p>21 reason.</p> <p>22 Subjected to that, my Lady, we would entirely agree.</p> <p>23 MRS JUSTICE ANDREWS: Let's see what Ms Cockerill says.</p> <p>24 Submissions by MS COCKERILL</p> <p>25 MS COCKERILL: Well my Lady, the position is this: it is</p> <p style="text-align: center;">Page 8</p>

<p>1 entirely fair to say that the letter of request from the</p> <p>2 US court was not specifically directed to sources.</p> <p>3 Obviously. It's directed to the materials. But the</p> <p>4 sources are, we say, an integral part of the evidence</p> <p>5 for the trial.</p> <p>6 So it's not, as my learned friend would like to say</p> <p>7 and I entirely understand why he sees it that way,</p> <p>8 a fishing expedition, an attempt to get the names of</p> <p>9 these people, simply to go off and use them as</p> <p>10 witnesses. That, I accept, would be an impermissible</p> <p>11 fishing expedition.</p> <p>12 What it is is what we have at the moment is,</p> <p>13 effectively, these reports. The reports are anonymised</p> <p>14 and they say certain things. When the New York court</p> <p>15 comes to deal with questions, such as: what was the</p> <p>16 investigation which was done, how long did it last, what</p> <p>17 was its nature, when did red flags arise, in order to</p> <p>18 evaluate the evidence which it gets from that report,</p> <p>19 it's not any underpinnings, hence this application for</p> <p>20 the documents which underpin the report.</p> <p>21 Now, within that --</p> <p>22 MRS JUSTICE ANDREWS: I understand that as far as the</p> <p>23 documents are concerned, if and to the extent that those</p> <p>24 documents were supplied or their contents were supplied</p> <p>25 to Rio Tinto, because what really matters is what Rio</p> <p style="text-align: center;">Page 9</p>	<p>1 evidence. Something which comes from --</p> <p>2 MRS JUSTICE ANDREWS: From their perspective. If they</p> <p>3 didn't know who the sources were themselves, then they</p> <p>4 weren't in a position to evaluate the quality either.</p> <p>5 MS COCKERILL: Well with respect, my Lady, that is</p> <p>6 a question for the New York court. But you know, we are</p> <p>7 also, as you know, looking for categories of information</p> <p>8 which cover what was shared with Rio Tinto so that what</p> <p>9 can be seen as the whole picture as to what --</p> <p>10 MRS JUSTICE ANDREWS: What was shared with Rio Tinto,</p> <p>11 I actually have more sympathy with you. I mean, it</p> <p>12 seems to me that one has to break down this information</p> <p>13 into various categories, but if and insofar as Rio Tinto</p> <p>14 have conveniently lost, or no longer have available to</p> <p>15 them, certain materials which were provided to them</p> <p>16 outwith the reports, which would add to the quality of</p> <p>17 their knowledge, then in principle you should have them,</p> <p>18 subject to the question about the anonymity of the</p> <p>19 sources.</p> <p>20 If those sources were anonymised with Rio Tinto,</p> <p>21 then one gets into quite an interesting state of</p> <p>22 affairs. If, as between the suppliers of the</p> <p>23 information and Rio Tinto, the sources were not</p> <p>24 anonymised, you're on stronger ground, it seems to me.</p> <p>25 MS COCKERILL: On that question, my Lady, the answer comes,</p> <p style="text-align: center;">Page 11</p>
<p>1 Tinto knew or what Rio Tinto, with reasonable diligence,</p> <p>2 could have found out at the time, in terms of red flags.</p> <p>3 But what I do not at the moment understand,</p> <p>4 Ms Cockerill, is why the -- I can see in a different</p> <p>5 context why it might be said: well if the source of the</p> <p>6 report was somebody close to the government in Guinea,</p> <p>7 that would tend to indicate that it was quite a reliable</p> <p>8 source, but if it was the man who was walking down the</p> <p>9 street who just happened to see something dodgy going</p> <p>10 on, it would not be. That I can see entirely, that the</p> <p>11 nature of the source might well be relevant to the</p> <p>12 evaluation of the quality of the evidence.</p> <p>13 But the quality of the evidence is not material to</p> <p>14 your limitation defence, is it?</p> <p>15 MS COCKERILL: Well my Lady, we say that it is because in</p> <p>16 order to evaluate what is known and what RTZ ought to</p> <p>17 have done, whether they ought to have pursued leads with</p> <p>18 more diligence, which is all part of the limitation</p> <p>19 argument -- it's not simply a question of: well if they</p> <p>20 didn't know by a certain period, then time bar operates.</p> <p>21 It's whether they had certain red flags to know and</p> <p>22 whether they pursued their investigation with diligence,</p> <p>23 whether they were looking at certain other things.</p> <p>24 Within those, you look at what was the information</p> <p>25 that they have and what was the quality of that</p> <p style="text-align: center;">Page 10</p>	<p>1 they're not. It is a very interesting question, very</p> <p>2 interesting point that my learned friend's clients have</p> <p>3 never said that Rio Tinto could not or did not call for</p> <p>4 particular information or that Rio Tinto could not have</p> <p>5 seen the sources or didn't see the sources.</p> <p>6 MRS JUSTICE ANDREWS: I thought there was some information</p> <p>7 about that in the witness statements but Mr George will</p> <p>8 no doubt take me to it.</p> <p>9 MS COCKERILL: There's is the Begbies Traynor indication</p> <p>10 that there was a whole database available to RT,</p> <p>11 following on the submission of the Project Raven report.</p> <p>12 But the position, my Lady, is this, that if you have</p> <p>13 a situation where this information is shared, or might</p> <p>14 have been shared, my clients need to know what was the</p> <p>15 evaluation which could have been put on it, what was the</p> <p>16 commentary which might have been passed on in relation</p> <p>17 to the value of the sources.</p> <p>18 The sources indicate what RT ought to have been</p> <p>19 doing. Without the sources, one is advanced somewhat</p> <p>20 from the position in the anonymised overarching reports,</p> <p>21 but one cannot see the full spectrum of what was</p> <p>22 available to RT. Your Ladyship will bear in mind that</p> <p>23 the allegations against my clients in the US court are</p> <p>24 incredibly serious ones and to be able to evaluate what</p> <p>25 RT had available to them and what they really should</p> <p style="text-align: center;">Page 12</p>

<p>1 have been doing, is the key thing. Without the sources, 2 it is next door to impossible to get that fuller 3 valuation in front of the US court.</p> <p>4 So far as the position in the US court is concerned, 5 I will have to take instructions on exactly where this 6 is to be found. I believe that there is a passage which 7 specifically refers to the question of sources and 8 magistrate Judge Peck said that sources should be 9 available. That is obviously not determinative as far 10 as you are concerned because one appreciates that the US 11 court looks at these things with two hats on. But he 12 certainly said that sources would be available, or 13 should be available. And that's an indication that the 14 US court does regard that as a matter of moment so far 15 as the proceedings -- I cannot take it further than 16 that --</p> <p>17 MRS JUSTICE ANDREWS: It was not the basis on which you made 18 your application, was it?</p> <p>19 MS COCKERILL: My Lady, we didn't make the application on 20 the basis of sources because we are seeking more than 21 sources. It would have been the basis on which we would 22 have made the application, if we had been given the 23 documents anonymised. Then obviously the basis on which 24 we would have made the application was sources. 25 But at the time we made the application, it was not</p> <p style="text-align: center;">Page 13</p>	<p>1 your limitation case on the basis of what Rio Tinto knew 2 and what, in the face of that information, Rio Tinto 3 should have done with it.</p> <p>4 Now, I can't at the moment see why the source of 5 the -- first of all, if Rio Tinto themselves didn't know 6 who the sources were, then that helps you in your 7 limitation case at all, and even if they did know what 8 the source of the information was, or who the sources of 9 the information were, whether that actually advances or 10 otherwise, a case on limitation that you're seeking to 11 put forward.</p> <p>12 MS COCKERILL: I think I may be able to help you a little 13 further by reference to Mr Kelly's second witness 14 statement. Can I take you to a couple of passages in 15 that, my Lady?</p> <p>16 MRS JUSTICE ANDREWS: Yes.</p> <p>17 MS COCKERILL: Paragraph 52, which is at page 14. 18 Paragraphs 52 and 54 really are the key, as far as we 19 are concerned. Mr Kelly says: 20 "The source's names are necessary to enable the 21 New York court to assess their credibility and 22 reliability as sources of information upon which the 23 reports are based, as well as to understand the 24 investigation Rio Tinto claimed it used the 25 investigative firms to conduct and that the New York</p> <p style="text-align: center;">Page 15</p>
<p>1 something which was flagged up, I think, to us, as an 2 issue that needed to be specifically raised. What we 3 were looking for was -- your Ladyship has seen a large 4 number of categories of documents. It is the documents 5 that we seek, together with the sources. The sources 6 are part of the documents. What you have, effectively, 7 is that we are entitled, I think everybody agrees, to 8 a large number of these documents and the question is 9 whether key parts of them can be taken out. So we have 10 a right, and it's a question of whether they can be 11 taken out. It was not a matter for us to advance as the 12 basis of our letter of request. We simply sought the 13 documents au naturel.</p> <p>14 MRS JUSTICE ANDREWS: Yes.</p> <p>15 MS COCKERILL: And prima facie that is what we are entitled 16 to unless my learned friend makes out a case otherwise.</p> <p>17 MRS JUSTICE ANDREWS: Well that is true to a certain extent. 18 But in evaluating whether or not you are -- I should 19 exercise my discretion in favour of redaction. I have 20 to take into account the real basis for which you need 21 these documents or want these documents and what you 22 said to the US court, as to your reasons for wanting 23 these documents.</p> <p>24 Now, as I see it very clearly, that you say the 25 reason you want these documents is to be able to advance</p> <p style="text-align: center;">Page 14</p>	<p>1 court found had been put at issue by Rio Tinto, 2 including by reference to such factors as the source's 3 background and whether they have links to other 4 interested parties. The New York court will not be able 5 to determine what needs the firms had and whether they 6 followed all these, whether the failure to follow leads 7 was a function of any improper concealing conduct 8 without knowing what those leads were and it will not be 9 able to understand and assess the significance of the 10 materials provided to Rio Tinto without knowing that 11 that information is credible."</p> <p>12 Then at paragraph 54: 13 "I am told by my New York colleagues that the court 14 will not be able to substantiate the information in the 15 reports in determining the thoroughness of the work of 16 the investigative firms, if it is deprived of the 17 information regarding the sources that were consulted in 18 the investigation and whose information Rio Tinto and/or 19 the investigative firms could have used to conduct their 20 investigation."</p> <p>21 MRS JUSTICE ANDREWS: Why is the New York court going to be 22 involved in substantiating the information? The 23 question for the New York court is whether, on the basis 24 of that information, whether substantiated or not, there 25 was sufficient knowledge in Rio Tinto to make the very</p> <p style="text-align: center;">Page 16</p>

<p>1 serious allegations against your clients that it's now</p> <p>2 advancing.</p> <p>3 MS COCKERILL: Well it also goes to the merits of the case</p> <p>4 advanced by Rio Tinto. It does, obviously, go, very</p> <p>5 significantly, to the time bar point but if, for</p> <p>6 example -- one of the points that my clients have made</p> <p>7 on a couple of occasions, the conspiracy which is</p> <p>8 alleged is a conspiracy in 2008 between Vale, as they</p> <p>9 prefer to be called, and BSGR. One of the things which</p> <p>10 will be relevant in establishing whether there was such</p> <p>11 conspiracy is evidence as to the contacts which BSGR had</p> <p>12 at the relevant point and, in particular, whether it had</p> <p>13 contacts with a variety of other people instead of Vale.</p> <p>14 So a number of other firms from which they could have</p> <p>15 got some of the information that RT says shows that Vale</p> <p>16 must have been spilling secrets to BSGR as to projects</p> <p>17 that RT had in the pipeline which they say Vale knew</p> <p>18 about --</p> <p>19 MRS JUSTICE ANDREWS: That's the substantive issues in the</p> <p>20 substantive action, that's not the limitation point.</p> <p>21 MS COCKERILL: But it goes to both, my Lady, it's</p> <p>22 primarily -- a lot of what the investigative firms did</p> <p>23 is about the limitation point but there will also</p> <p>24 potentially be material which is relevant to the</p> <p>25 substantive issues and it's put on both --</p> <p style="text-align: center;">Page 17</p>	<p>1 three firms, and I forget which one it is, there was</p> <p>2 a very helpful schedule produced which gave a generic</p> <p>3 description of what the source did.</p> <p>4 Submissions by MR GEORGE</p> <p>5 MR GEORGE: My Lady, I think that was Mr Huband of</p> <p>6 Livingstone.</p> <p>7 MRS JUSTICE ANDREWS: That's right.</p> <p>8 MR GEORGE: And that was in tab 6 of the Farrers bundle</p> <p>9 which I have in blue.</p> <p>10 MRS JUSTICE ANDREWS: Yes, the blue one.</p> <p>11 MR GEORGE: It's page 7. Sources A to I are ...</p> <p>12 MRS JUSTICE ANDREWS: Yes. Would you resist it if the court</p> <p>13 were to say: well a description of that generic nature</p> <p>14 could be given in relation to the sources, so that if</p> <p>15 you redact the names and the precise identities or</p> <p>16 information, that is going to lead to the precise</p> <p>17 identity of the person but one instead said it was</p> <p>18 source A and you had a key?</p> <p>19 MR GEORGE: My Lady, may I take instructions? I have three</p> <p>20 clients. Obviously, that is there from Livingstone so</p> <p>21 that is in the record.</p> <p>22 MRS JUSTICE ANDREWS: But that's what is going through my</p> <p>23 mind as one particular way of dealing with this because</p> <p>24 it would enable Ms Cockerill's clients to know whether</p> <p>25 the source was the man in the street or somebody at the</p> <p style="text-align: center;">Page 19</p>
<p>1 MRS JUSTICE ANDREWS: That is not the basis on which you</p> <p>2 asked for the letters of request, Ms Cockerill. The</p> <p>3 basis on which the letters of request were asked was to</p> <p>4 help you with the limitation issues --</p> <p>5 MS COCKERILL: Well, my Lady, I think the letters of request</p> <p>6 actually cover the issues generally. Paragraph 8.1 of</p> <p>7 any of the letters of request:</p> <p>8 "Rio Tinto's claims are fundamentally on BSGR's</p> <p>9 alleged bribery and corruption and the allegation that</p> <p>10 BSGR formed a conspiracy."</p> <p>11 So it actually goes:</p> <p>12 "For the purposes of justice and for the</p> <p>13 determination of the matters in dispute [so and so] is</p> <p>14 a relevant witness."</p> <p>15 So the overarching merits of the claim are</p> <p>16 definitely cited as the letter of request.</p> <p>17 MRS JUSTICE ANDREWS: I am sure they are.</p> <p>18 MS COCKERILL: It is a two pronged attack.</p> <p>19 MRS JUSTICE ANDREWS: Right. Anyway, you maintain that you</p> <p>20 need these sources to be revealed?</p> <p>21 MS COCKERILL: I am afraid so, my Lady.</p> <p>22 MRS JUSTICE ANDREWS: Right. Mr George, is there a halfway</p> <p>23 house? The identities of the individuals, I can see why</p> <p>24 you're saying what you're saying. But in one of the</p> <p>25 numerous witness statements I've got from one of the</p> <p style="text-align: center;">Page 18</p>	<p>1 heart of government, but it wouldn't necessarily put</p> <p>2 that person at fear or at risk of being outed and</p> <p>3 therefore questions of personal safety might not come</p> <p>4 in.</p> <p>5 MR GEORGE: My Lady, the client would be in the best</p> <p>6 position to determine what --</p> <p>7 MRS JUSTICE ANDREWS: I am happy to rise for a short time.</p> <p>8 Let me just sound out Ms Cockerill on that. Would that</p> <p>9 not meet your client's position fairly well,</p> <p>10 Ms Cockerill?</p> <p>11 MS COCKERILL: My Lady, I think I will have to take</p> <p>12 instructions on that. I suspect not but I will have to</p> <p>13 come back to you if your Ladyship rises.</p> <p>14 What I would say is if your Ladyship is looking for</p> <p>15 a way through, and I entirely understand that because it</p> <p>16 is entirely what the court is urged to do in cases of</p> <p>17 confidentiality, this is rather difficult because</p> <p>18 sources, we say, are so integral.</p> <p>19 It's the protective order. There is a protective</p> <p>20 order in place in the States. My clients are more than</p> <p>21 happy to agree that whatever documents raise the names</p> <p>22 of the sources should go into the protective order.</p> <p>23 That protective order is one which is limited to</p> <p>24 non-party legal counsel, so there is no question of it</p> <p>25 getting back to the parties. Your Ladyship is familiar</p> <p style="text-align: center;">Page 20</p>



<p>1 with these sorts of confidentiality clubs in a variety</p> <p>2 of other litigations.</p> <p>3 My learned friend says -- his clients say that is</p> <p>4 not satisfactory to them. We say that that's an</p> <p>5 unreasonable stand and that is a very good way of</p> <p>6 cutting through.</p> <p>7 MRS JUSTICE ANDREWS: The thought of that actually went</p> <p>8 through my mind as well, whether to make it the subject</p> <p>9 of a protective order but we all know that leaks can</p> <p>10 occur and where people's lives are at risk, and I am</p> <p>11 alive to the fact that people's lives may be at risk,</p> <p>12 one has to be ultra cautious.</p> <p>13 MR GEORGE: My Lady, in my submission, that is not a short</p> <p>14 cut at all. If it is right that, on balance, these</p> <p>15 sources should not be disclosed, then they should be</p> <p>16 protected, in my submission. If that is wrong and</p> <p>17 my Lady is against me, then obviously I would invite and</p> <p>18 I hope I would not be opposed, all protective measures</p> <p>19 to be taken to protect that information. But in terms</p> <p>20 of whether the confidentiality should be breached in the</p> <p>21 first place, in my submission that is a matter of</p> <p>22 principle and one cannot have a short cut that actually</p> <p>23 involves disclosing that information.</p> <p>24 Where my lady is clearly, in my respectful</p> <p>25 submission, correct is that one certainly very useful</p> <p style="text-align: center;">Page 21</p>	<p>1 Rio Tinto arrangement with at least one of the parties</p> <p>2 that you represent, that Rio Tinto has an unfettered</p> <p>3 right to call upon that particular provider to reveal to</p> <p>4 it any information, including the names of the sources,</p> <p>5 and indeed I am fortified in that view of the relevant</p> <p>6 clause by the fact that there is an express</p> <p>7 confidentiality term in that contract which works the</p> <p>8 other way. In other words, any information that is</p> <p>9 provided by Rio Tinto to the investigator is expressly</p> <p>10 subject to duties of confidentiality which outlive the</p> <p>11 contract, but it does not go the other way round.</p> <p>12 MR GEORGE: My Lady, nothing in this application concerns</p> <p>13 information provided by any of my clients to Rio Tinto.</p> <p>14 MRS JUSTICE ANDREWS: No. But what I'm saying is that the</p> <p>15 absence of a contractual, an express contractual</p> <p>16 provision which mirrors the Rio Tinto one is a very</p> <p>17 strong indicator that there is no duty of</p> <p>18 confidentiality because if there was, it would be in the</p> <p>19 contract and the contract seems to me, on the face of</p> <p>20 it, to suggest that Rio Tinto can ask your clients for</p> <p>21 any information it chooses without any fetter. So</p> <p>22 you're going to have to persuade me that there is a duty</p> <p>23 of confidentiality that attaches to this information and</p> <p>24 that's why, although I have some sympathy in relation to</p> <p>25 individuals who might be put at risk, I am not entirely</p> <p style="text-align: center;">Page 23</p>
<p>1 short cut is to provide the types of information that</p> <p>2 can safely be provided, as Mr Huband has done in his</p> <p>3 witness statement, which A, will, on my learned friend's</p> <p>4 case, assist them, and B, will certainly allow them to</p> <p>5 take a more reasoned view as to whether there is any</p> <p>6 possible justification for any individual source being</p> <p>7 the subject of a further application, if it really can</p> <p>8 be said to be relevant and necessary to the</p> <p>9 limitation --</p> <p>10 MRS JUSTICE ANDREWS: You're talking about some kind of</p> <p>11 incremental approach.</p> <p>12 MR GEORGE: I am not encouraging it, my Lady, but if there</p> <p>13 was to be --</p> <p>14 MRS JUSTICE ANDREWS: Neither am I --</p> <p>15 MR GEORGE: My Lady is considering, as it were, ways through</p> <p>16 and in my submission that need not be ruled out, as it</p> <p>17 were, if my Lady has concerns that it may at some stage</p> <p>18 be appropriate further to consider the question of</p> <p>19 sources.</p> <p>20 MRS JUSTICE ANDREWS: Yes. I mean I am trying to be</p> <p>21 practical and fair to both parties at the moment because</p> <p>22 your case is not without its difficulties either,</p> <p>23 Mr George, in terms of where this duty of</p> <p>24 confidentiality comes from, and in particular, I have in</p> <p>25 mind the fact that it appears to me, on the face of the</p> <p style="text-align: center;">Page 22</p>	<p>1 against Ms Cockerill in terms of the principles in</p> <p>2 relation to the confidentiality, which is why I think it</p> <p>3 might be in everybody's interest to try and come up with</p> <p>4 a medium solution.</p> <p>5 So I am going to rise for five minutes to see if you</p> <p>6 can take instructions, both of you, but don't think</p> <p>7 I have made my mind up. I haven't.</p> <p>8 (11.05 am)</p> <p>9 (A short break)</p> <p>10 (11.09 am)</p> <p>11 Submissions by MS COCKERILL</p> <p>12 MRS JUSTICE ANDREWS: Yes?</p> <p>13 MS COCKERILL: Well, my Lady, I hate to be a party pooper</p> <p>14 but I am afraid that I have taken instructions and I am</p> <p>15 told that that is not acceptable. I am also asked to</p> <p>16 draw your Ladyship's attention to passages in the</p> <p>17 letters of request which we have found which</p> <p>18 specifically show the American court saying that it</p> <p>19 wants to hear who the investigative firms interviewed.</p> <p>20 You find it at section --</p> <p>21 MRS JUSTICE ANDREWS: Which particular bundle do you want me</p> <p>22 to look at the letters of request in?</p> <p>23 MS COCKERILL: If you were to look in the attachment to</p> <p>24 Mr Kelly's second witness statement, wherever you have</p> <p>25 that.</p> <p style="text-align: center;">Page 24</p>

<p>1 MRS JUSTICE ANDREWS: Yes.</p> <p>2 MS COCKERILL: If you were to turn up page 32 of that</p> <p>3 exhibit, you see section 10 --</p> <p>4 MRS JUSTICE ANDREWS: This is about the witnesses being</p> <p>5 examined?</p> <p>6 MS COCKERILL: Yes, "It's requested each witness be</p> <p>7 questioned", et cetera, et cetera. Then if you turn</p> <p>8 over the page, you have key findings, including the</p> <p>9 scope and timing of its engagement, who it interviewed,</p> <p>10 what documents it reviewed, its findings and conclusions</p> <p>11 and you find --</p> <p>12 MRS JUSTICE ANDREWS: Yes, about as wide as it could</p> <p>13 possibly be, isn't it?</p> <p>14 MS COCKERILL: You find the same wording in the other</p> <p>15 letters of request. The reference for the CTG one is</p> <p>16 page 82 of the bundle.</p> <p>17 MRS JUSTICE ANDREWS: That's in relation to witnesses,</p> <p>18 that's not in relation to the documents, is it?</p> <p>19 MS COCKERILL: Well of course, as I said earlier, you would</p> <p>20 only really get the reference to who it interviewed in</p> <p>21 the context of the witnesses because as far as the US</p> <p>22 court is concerned, it is looking at the documents</p> <p>23 whole. The question of sources is not live at that</p> <p>24 point, we are simply seeking the documents, including</p> <p>25 the sources.</p> <p style="text-align: center;">Page 25</p>	<p>1 request be running (?) at all, there's nothing that can</p> <p>2 actually satisfy this court there could be any relevance</p> <p>3 to the information of the sources to any issue in the</p> <p>4 American proceedings, in my submission.</p> <p>5 MRS JUSTICE ANDREWS: Only if it gets past limitation.</p> <p>6 MR GEORGE: With the exception of limitation, but as my Lady</p> <p>7 said, that has to be focused on what Rio Tinto knew and</p> <p>8 what Rio Tinto knew has already been disclosed. That is</p> <p>9 not what is --</p> <p>10 MRS JUSTICE ANDREWS: Is that right because I thought there</p> <p>11 were documents or information passing between your</p> <p>12 clients at various stages in Rio Tinto, that Rio Tinto</p> <p>13 said they no longer had and they would have to go to</p> <p>14 your clients for them.</p> <p>15 MR GEORGE: My Lady, that's not something -- I may have ...</p> <p>16 (Pause).</p> <p>17 My Lady, I will check that. That is not my</p> <p>18 understanding. My understanding is nobody is suggesting</p> <p>19 that Rio Tinto have not disclosed everything which they</p> <p>20 received from each of the clients in the American</p> <p>21 proceedings.</p> <p>22 MRS JUSTICE ANDREWS: I think the allegation is that Rio</p> <p>23 Tinto have stuck rigidly to the letter of what they were</p> <p>24 ordered to disclose in terms of what they physically</p> <p>25 still had in their possession but that there may be</p> <p style="text-align: center;">Page 27</p>
<p>1 MRS JUSTICE ANDREWS: Right. Mr George? Would your clients</p> <p>2 be prepared to produce the halfway house?</p> <p style="text-align: center;">Submissions by MR GEORGE</p> <p>4 MR GEORGE: My Lady, our position is that, yes, we would</p> <p>5 have been, although it appears now irrelevant, to have</p> <p>6 consented to an order that where a redaction was made</p> <p>7 for the purpose of preserving confidentiality, and</p> <p>8 I won't draft on my feet, but we would undertake to</p> <p>9 provide full details relating to that source, as could</p> <p>10 assist in assessing the reliability and relevance of</p> <p>11 this material, insofar as we considered it compatible</p> <p>12 with the duties of confidentiality, which could then</p> <p>13 have been considered and potentially probed on an</p> <p>14 incremental basis, my Lady. However as I understand,</p> <p>15 that is not ...</p> <p>16 MRS JUSTICE ANDREWS: Don't rule it out all together.</p> <p>17 MR GEORGE: My Lady, that in my submission -- because the</p> <p>18 concern is, in a sense, a narrow one, it is to protect</p> <p>19 the identity of people who may suffer recriminations --</p> <p>20 and I appreciate I will have to make submissions on</p> <p>21 this -- to whom the duty of confidentiality is owed, and</p> <p>22 in my submission, looking at the other side of the</p> <p>23 balancing scales, there is nothing before the court.</p> <p>24 Even if one can say: well there are some wide words by</p> <p>25 the American court that could effectively mean this</p> <p style="text-align: center;">Page 26</p>	<p>1 information that had passed to Rio Tinto which they no</p> <p>2 longer have, which is one of the reasons why your</p> <p>3 clients are being asked for the information that they</p> <p>4 actually passed to Rio Tinto, as opposed to the business</p> <p>5 reports themselves.</p> <p>6 MR GEORGE: Now, my Lady, that may well be -- it is clearly</p> <p>7 possible in any circumstance to say Rio Tinto have given</p> <p>8 what they still have but how do we know they haven't</p> <p>9 done -- I understand that. But to that extent we are</p> <p>10 then considering, purely, a very, very narrow category</p> <p>11 of documents which are those which were provided to Rio</p> <p>12 Tinto.</p> <p>13 Although I will take instructions, my understanding</p> <p>14 is that none of the information provided to Rio Tinto</p> <p>15 will contain any of the sensitive information. So that</p> <p>16 would not be controversial for these purposes because</p> <p>17 anything disclosed to Rio Tinto by any of my three</p> <p>18 clients will not raise these confidentiality issues.</p> <p>19 MRS JUSTICE ANDREWS: So if one is concentrating on what Rio</p> <p>20 Tinto actually knew, you are telling me that Rio Tinto</p> <p>21 did not know who the sources were?</p> <p>22 MR GEORGE: No. Nothing that is being applied for by my</p> <p>23 learned friend, and which we are objecting to disclosure</p> <p>24 of, was ever known by Rio Tinto.</p> <p>25 I understand my Lady's point that it may be that</p> <p style="text-align: center;">Page 28</p>

<p>1 there are things Rio Tinto once had because we gave</p> <p>2 them -- they failed to disclose and I see the force in</p> <p>3 that but that is not a point that engages the</p> <p>4 confidentiality issue because if there is any such</p> <p>5 material, it will not have contained anything which we</p> <p>6 now wish to protect. So to the extent that subset is of</p> <p>7 concern to my Lady, it's not something that raises this</p> <p>8 confidentiality problem.</p> <p>9 MRS JUSTICE ANDREWS: Right.</p> <p>10 MR GEORGE: So my Lady, addressing the confidentiality</p> <p>11 itself -- I will try to do it as briefly as possible</p> <p>12 because my Lady has obviously traversed a substantial</p> <p>13 part of the ground.</p> <p>14 MRS JUSTICE ANDREWS: Let's go through it in a little more</p> <p>15 detail because as I understand it, the question of</p> <p>16 making the request more specific, I think, is something</p> <p>17 that can be sorted out between you, can it not?</p> <p>18 MR GEORGE: That is certainly the subsidiary element of this</p> <p>19 morning.</p> <p>20 MRS JUSTICE ANDREWS: Right.</p> <p>21 MR GEORGE: The meat related to the cooks to the sauces.</p> <p>22 My Lady, I am very conscious of how inefficient it</p> <p>23 will be to continually flick through evidence in</p> <p>24 different bundles, so I have taken the liberty of</p> <p>25 preparing a short schedule which has no commentary at</p> <p style="text-align: center;">Page 29</p>	<p>1 they would not be entitled to that information and they</p> <p>2 certainly haven't --</p> <p>3 MRS JUSTICE ANDREWS: It depends, really, what system of law</p> <p>4 governs the contract. If it was English, they would,</p> <p>5 very clearly. I can't even see the contrary argument,</p> <p>6 Mr George, at the moment.</p> <p>7 MR GEORGE: Would it be of assistance to turn to the</p> <p>8 contract? It's not the determinative point but does</p> <p>9 my Lady have it in the DWF bundle?</p> <p>10 MRS JUSTICE ANDREWS: Goodness knows where I have it.</p> <p>11 I don't like to nag to you, Mr George, I don't want to</p> <p>12 shoot the messenger, but really, an application of this</p> <p>13 kind, to be produced in three bundles in this haphazard</p> <p>14 way, is wholly unsatisfactory.</p> <p>15 MR GEORGE: I appreciate that, my Lady, and I apologise.</p> <p>16 The DWF file, tab 5, has the --</p> <p>17 MRS JUSTICE ANDREWS: I have Mr Humphrey's witness statement</p> <p>18 and -- yes.</p> <p>19 MR GEORGE: Precisely.</p> <p>20 MRS JUSTICE ANDREWS: The express confidentiality clause is</p> <p>21 paragraph 32. It's all one way, as you will see, it's</p> <p>22 all in relation to the consultant having to keep</p> <p>23 confidential information given to it for the purposes of</p> <p>24 the consultancy services.</p> <p>25 Confidential information, I think, is expressly</p> <p style="text-align: center;">Page 31</p>
<p>1 all, purely extracts from evidence so that my Lady has</p> <p>2 it. I will pass it to my learned friend. (Handed).</p> <p>3 I will start, my Lady if I may, by looking at the</p> <p>4 evidence in relation to the confidentiality itself and</p> <p>5 I will then turn to the other side of the scale which is</p> <p>6 what relevance is it to the American litigation.</p> <p>7 My Lady, I highlight from this table, three</p> <p>8 particular passages. Firstly, the third entry on page 1</p> <p>9 from Mr Huband:</p> <p>10 "I can confirm that each of the sources who have</p> <p>11 been identified at paragraphs G to NN of schedule A of</p> <p>12 the order, will have received a specific assurance from</p> <p>13 Livingstone, Guinea and/or Liberia in country associates</p> <p>14 that their identity will not be disclosed in any event."</p> <p>15 So that is an express assurance of confidentiality</p> <p>16 provided to a source and at the risk of repeating,</p> <p>17 my Lady, just so it's clear, and the identity of that</p> <p>18 source has never been provided to Rio Tinto. And on the</p> <p>19 evidence of Mr Parkhouse for Livingstone -- if I give</p> <p>20 you the reference, this is paragraph 9 of Mr Parkhouse's</p> <p>21 second witness statement. It wouldn't be provided to</p> <p>22 Rio Tinto if they asked. They haven't asked. And,</p> <p>23 my Lady, we can debate Rio Tinto's contractual</p> <p>24 entitlement, although in a sense that is a matter for</p> <p>25 Rio Tinto, perhaps, but my client's position is, no,</p> <p style="text-align: center;">Page 30</p>	<p>1 defined but it doesn't involve information going from</p> <p>2 the consultant to Rio Tinto.</p> <p>3 When we go back to paragraph 16.1, paragraph 16.1</p> <p>4 says:</p> <p>5 "The consultant must provide Rio Tinto, or the</p> <p>6 relevant company, with any information requested by</p> <p>7 either of them in relation to the provision of the</p> <p>8 consultancy services."</p> <p>9 MR GEORGE: Now my Lady, as I say, not the most</p> <p>10 determinative point but I will make the submissions so</p> <p>11 my Lady has them.</p> <p>12 Our submission is clause 16.1 does not enable Rio</p> <p>13 Tinto to ask, effectively, for further consultancy</p> <p>14 services or further information in the nature of</p> <p>15 detailed information or reports, such as the sources.</p> <p>16 What it does -- and you can see, my Lady, that clause 16</p> <p>17 relates to consultants' information, accounts and</p> <p>18 records -- it enables and it intended to enable, Rio</p> <p>19 Tinto to carry out an effective audit of the services</p> <p>20 which have been provided, just so we actually have done</p> <p>21 what we say we have done. It has not entitled them to</p> <p>22 information which they know is confidential and I rely,</p> <p>23 my Lady, on clause 3.4E, the consultants'</p> <p>24 representations:</p> <p>25 "The consultants ... Rio Tinto in each relevant</p> <p style="text-align: center;">Page 32</p>



<p>1 company ... The execution of the contract and the</p> <p>2 performance of the consultancy services do not and will</p> <p>3 not result in a breach of the terms of or ... under any</p> <p>4 agreement or undertaking, whether verbal or written or</p> <p>5 any instrument to which the consultant may be affected</p> <p>6 or bound."</p> <p>7 Now my Lady, if the construction of clause 16.1</p> <p>8 contended by Vale is right, then that representation was</p> <p>9 necessarily wrong because everybody knew, both Rio Tinto</p> <p>10 and the investigation firms, that there were obligations</p> <p>11 of confidentiality owed by, in this case, Begbies</p> <p>12 Traynor, to its sources, that it would be a breach of</p> <p>13 those obligations for Begbies Traynor to agree to</p> <p>14 provide that information to Rio Tinto and in my</p> <p>15 submission, and this would be the evidence, were the</p> <p>16 matter to fall for determination, clause 16.1 plainly</p> <p>17 was not intended to override an express obligation, in</p> <p>18 this case verbal, of confidentiality. And clause 16.1</p> <p>19 should be restricted by the promise in clause 3.4 and</p> <p>20 indeed the mutual understanding of the parties that they</p> <p>21 would not put each other in breach of verbal agreements</p> <p>22 with third parties.</p> <p>23 So my Lady --</p> <p>24 MRS JUSTICE ANDREWS: The fatal problem with that argument</p> <p>25 is clause 3.4 is a representation as at the date of the</p> <p style="text-align: center;">Page 33</p>	<p>1 confidential.</p> <p>2 MR GEORGE: Well my Lady, that is the position but, equally,</p> <p>3 that is the evidence before this court. With respect --</p> <p>4 MRS JUSTICE ANDREWS: It's not very good, is it?</p> <p>5 MR GEORGE: -- it is the best evidence before this court.</p> <p>6 One could not, as it were, expect the source, as it</p> <p>7 were, themselves to provide at this stage, a witness</p> <p>8 statement, but you do have direct evidence from the</p> <p>9 representatives of the company. My Lady, in my</p> <p>10 submission, it's not only the evidence from those</p> <p>11 representatives of what they have been informed happened</p> <p>12 in this particular case, it is also evidence of the</p> <p>13 general business practices which are undertaken in this</p> <p>14 field by business intelligence professionals.</p> <p>15 It would be, in my submission, surprising, if it</p> <p>16 were to be the case that people were asked to reveal</p> <p>17 what, by its nature, is sensitive information, which</p> <p>18 could lead to recriminations, without receiving the</p> <p>19 types of assurances that the various deponents before</p> <p>20 this court say were expressly provided.</p> <p>21 MRS JUSTICE ANDREWS: If the information is not sensitive</p> <p>22 in the sense that it is wrongfully provided --</p> <p>23 MR GEORGE: Quite, which is not suggested.</p> <p>24 MRS JUSTICE ANDREWS: -- which is never suggested, then</p> <p>25 I think one has to look at the nature of the</p> <p style="text-align: center;">Page 35</p>
<p>1 contract and it is a representation that there has not</p> <p>2 in fact been, and will not be, a breach of an order,</p> <p>3 rule, regulation, injunction, decree, et cetera, or the</p> <p>4 terms of an undertaking.</p> <p>5 Now, that's as at the date of the contract. It's</p> <p>6 a representation by the consultants, of Rio Tinto. So</p> <p>7 it's saying: well when we provide you with the report,</p> <p>8 we are not going to be in breach of our obligations to</p> <p>9 a third party. That seems to me to be a very different</p> <p>10 thing from saying: well Rio Tinto can't call upon you at</p> <p>11 a later stage to substantiate the information you're</p> <p>12 giving us, by revealing who you got it from.</p> <p>13 MR GEORGE: Maybe they can call but we will not -- and this</p> <p>14 is the representation, that we will make sure we don't</p> <p>15 put Rio Tinto in the position of requiring us to breach</p> <p>16 an obligation to a third party.</p> <p>17 That is precisely what has happened. They have</p> <p>18 asked, because they were asked in terms of the court</p> <p>19 proceedings and we have said: no, that would breach an</p> <p>20 obligation to a third party.</p> <p>21 So that is the position vis-a-vis Rio Tinto.</p> <p>22 MRS JUSTICE ANDREWS: All I have at the moment in terms of</p> <p>23 evidence on this is a general allegation, which is at</p> <p>24 best hearsay, that assurances have been given by X to Y</p> <p>25 in the background, that the information will be kept</p> <p style="text-align: center;">Page 34</p>	<p>1 information. If it's out there in the public domain and</p> <p>2 it's just evidence gathering, then one cannot see why</p> <p>3 gathering it and providing it is going to put anybody in</p> <p>4 any danger at all.</p> <p>5 It's only if somebody -- I can see that there may be</p> <p>6 political sensitivities in a country such as Guinea, so</p> <p>7 if you have sources close to the government and they</p> <p>8 seem to be shopping one of their number for malpractice,</p> <p>9 then that's an obvious case. But somebody simply</p> <p>10 providing information as to what the situation is on the</p> <p>11 ground, is not going to be in the same position.</p> <p>12 MR GEORGE: My Lady, that is undoubtedly correct. What</p> <p>13 my Lady has, of course, is Mr Huband's helpful schedule</p> <p>14 of who we are trying to protect in this case.</p> <p>15 Those --</p> <p>16 MRS JUSTICE ANDREWS: It's interesting that Mr Huband</p> <p>17 I think it's Mr Huband, draws a distinction between the</p> <p>18 people he labels "associates" and the people he labels</p> <p>19 "sources". Speaking for myself, I can't at the moment</p> <p>20 see why any confidentiality should attach to the</p> <p>21 identification of the associates because they are the</p> <p>22 people who are effectively subcontractors who are being</p> <p>23 engaged to carry out the evidence gathering.</p> <p>24 Now they may use confidential sources and give</p> <p>25 confidential sources certain assurances that their</p> <p style="text-align: center;">Page 36</p>

<p>1 identities won't be disclosed, and it may well be that</p> <p>2 that's no different from the business intelligence</p> <p>3 agencies giving those assurances directly, because you</p> <p>4 are just looking at an associate acting, if you like, as</p> <p>5 the mouth piece or the employee or venture partner of</p> <p>6 the ultimate person who's trying to find out the</p> <p>7 information.</p> <p>8 Speaking for myself, I think that there's much more</p> <p>9 force in your argument in relation to the sources than</p> <p>10 there is in relation to the associates.</p> <p>11 MR GEORGE: My Lady, I see that. I will take instructions</p> <p>12 as to whether there are any associates we are seeking to</p> <p>13 protect before I go too far --</p> <p>14 MRS JUSTICE ANDREWS: That's what Mr Huband says. He says</p> <p>15 he wants all the associates protected, as well as the</p> <p>16 sources.</p> <p>17 MR GEORGE: The evidence is at paragraph 11 of Mr Huband's</p> <p>18 statement in relation to confidentiality --</p> <p>19 MRS JUSTICE ANDREWS: Remind me which of these many bundles</p> <p>20 is Mr Huband.</p> <p>21 MR GEORGE: Mr Huband is blue.</p> <p>22 MRS JUSTICE ANDREWS: Yes, okay. His witness statement</p> <p>23 I thought was the most helpful of all of them, I must</p> <p>24 say, in terms of what we're dealing with here.</p> <p>25 MR GEORGE: I hear that, my Lady. I should perhaps say on</p> <p style="text-align: center;">Page 37</p>	<p>1 to be a regional corruption investigator, then the fact</p> <p>2 he's identified as being the source of information</p> <p>3 relating to regional corruption is hardly going to put</p> <p>4 him in any danger, is it?</p> <p>5 MR GEORGE: Well my Lady, this obviously comes up quite</p> <p>6 often in this type of context as to whether, as it were,</p> <p>7 somebody is so notorious a target anyway that you are</p> <p>8 merely incrementally increasing the danger, as it were,</p> <p>9 by potentially annoying another 12 people, when he's</p> <p>10 already annoyed 1200.</p> <p>11 MRS JUSTICE ANDREWS: I do not think it's so much the</p> <p>12 annoyance, I think what's actually being said by</p> <p>13 Mr Huband is that other people might not employ him if</p> <p>14 his identity became known. That's what's being said,</p> <p>15 not that he would be harmed but his capacity to provide</p> <p>16 these services to people would be seriously harmed if</p> <p>17 his identity -- I don't know what that means.</p> <p>18 What it basically means is he might not be able to</p> <p>19 earn a living and I cannot see why he won't be able to</p> <p>20 earn a living unless he's under cover. He's a very</p> <p>21 senior, regional corruption investigator.</p> <p>22 MR GEORGE: My Lady, what is presumably being suggested is</p> <p>23 the evidence does not go so high as to suggest the risk</p> <p>24 of life and limb, the recriminations against him would</p> <p>25 take more economic form.</p> <p style="text-align: center;">Page 39</p>
<p>1 Mr Humphries' behalf, as he says, he knows nothing at</p> <p>2 all about anything, he was not able to assist</p> <p>3 particularly but ...</p> <p>4 MRS JUSTICE ANDREWS: He either knows or he doesn't.</p> <p>5 MR GEORGE: Quite. So the sources are at --</p> <p>6 MRS JUSTICE ANDREWS: He says that three of the associates</p> <p>7 were journalists and, of course, the journalists will</p> <p>8 have their own sources. They have a senior journalist</p> <p>9 associate. Well I can't see why the journalist is going</p> <p>10 to be put at risk by anything because it's just doing</p> <p>11 something on the side line which happens to be his or</p> <p>12 her job. No suggestion of any illegality by anybody.</p> <p>13 Why are the journalists going to be put at risk if their</p> <p>14 identities are known?</p> <p>15 MR GEORGE: My Lady, if I could short circuit, as it were.</p> <p>16 The people we seek to protect are at 24.1, page 7.</p> <p>17 MRS JUSTICE ANDREWS: Your sources A to G.</p> <p>18 MR GEORGE: Precisely. I am instructed B and C are the</p> <p>19 associates and I obviously can't develop the evidence</p> <p>20 beyond what is written there, for obvious reasons,</p> <p>21 that's the very point at which it's been framed. The</p> <p>22 only associates are B and C and the material relied upon</p> <p>23 is set out there.</p> <p>24 MRS JUSTICE ANDREWS: Yes. If somebody's job is to act as</p> <p>25 a regional corruption investigator and he's well known</p> <p style="text-align: center;">Page 38</p>	<p>1 MRS JUSTICE ANDREWS: I can see the government officials</p> <p>2 right. You have a government official who's a witness</p> <p>3 to key events and conversations, obviously he's</p> <p>4 a potential target.</p> <p>5 Ditto source G, which is going to cause problems.</p> <p>6 H is a journalist:</p> <p>7 "Exposure of his identity will hinder his access to</p> <p>8 information which has been of considerable value in</p> <p>9 improving global understanding of Guinea in political</p> <p>10 life." Whatever that means. I do not think exposure of</p> <p>11 his identity to the lawyers acting for Vale and Rio</p> <p>12 Tinto is going to make a huge deal of difference to his</p> <p>13 journalistic work.</p> <p>14 Ditto an academic.</p> <p>15 The executives, well ... I can see there's an</p> <p>16 argument in relation to the executives. And the ex</p> <p>17 patriot because I can well see if his name is revealed,</p> <p>18 there might be ...</p> <p>19 MR GEORGE: My Lady is obviously right that there are</p> <p>20 stronger and weaker justifications for each particular</p> <p>21 individual. But just stepping back of course, there is</p> <p>22 a balancing act to be carried out and what one would</p> <p>23 also need to carry out in relation to each of these</p> <p>24 individuals is what relevance is their evidence said to</p> <p>25 have to the US proceedings? Which in a sense is why</p> <p style="text-align: center;">Page 40</p>

<p>1 I floated, without necessarily encouraging, a more 2 incremental approach to this, whereby information of 3 this type that my Lady has just reviewed, could be 4 provided and one could then balance those arguments 5 against why it is said this individual has something 6 relevant to the United States proceedings, rather than 7 requiring them all to be disclosed without, in my 8 submission, any basis for submitting that they are 9 relevant at this time.</p> <p>10 In my submission, my Lady, and I understand 11 my Lady's points about: well some of the possible 12 consequences are going to be more serious than others 13 but, nonetheless, on the evidence before the court, an 14 express duty of confidentiality between the associates 15 and the sources and each of my clients, has been 16 established.</p> <p>17 There is an argument which my Lady and I have had 18 and I understand my Lady's point, about whether the 19 investigative firms have put themselves in a position 20 where they might have conflicting obligations, by 21 signing up to a contract with Rio Tinto that put them in 22 a position of potentially requiring them to breach those 23 obligations. I understand my Lady's point.</p> <p>24 But even if that were the case, that still means the 25 sources, the obligations that they were promised, will</p> <p style="text-align: center;">Page 41</p>	<p>1 turn it up. So paragraph 17, the DWF file, tab 5, 2 page 93.</p> <p>3 MRS JUSTICE ANDREWS: Yes.</p> <p>4 MR GEORGE: Second sentence of paragraph 17: 5 "Mr Brown also confirmed to me [the deponent] that 6 in relation to other sources not disclosed in the report 7 [ie that Rio Tinto have never been informed of], 8 specific undertakings with those sources were entered 9 into, into separately protecting the identity of the 10 source and undertaking that their identity would, under 11 no circumstances, be disclosed."</p> <p>12 That's what he knows from Mr Brown, so when he says 13 "evidently" in paragraph 80, he means, from what Mr 14 Brown's told me, it's not his direct knowledge but it's 15 what Mr Brown has told him.</p> <p>16 MRS JUSTICE ANDREWS: It's quite interesting. One looks at 17 it ... "The sources of information were largely, 18 largely, anonymous in the reporting sense [which 19 suggests they were not all anonymous.] To the extent 20 they agreed to their identity being disclosed, then 21 reference in the report was made and the identity 22 disclosed."</p> <p>23 In which case, if Vale have got the report, they 24 will know the identity.</p> <p>25 MR GEORGE: Yes, and there's nothing in this application</p> <p style="text-align: center;">Page 43</p>
<p>1 be breached. And that may be my client's fault but 2 that's still not fair or right that the sources should 3 suffer repercussions because of an ill advised signature 4 of what are, basically, Rio Tinto standard terms and 5 certainly there is no suggestion anyone at the time 6 considered that clause 16.1 would have the draconian 7 effect that Vale are now positing for it.</p> <p>8 Even if it did, the sources would be entitled to say 9 "Well I didn't make that contract and I have express 10 obligations of confidentiality." And without wishing to 11 rehash the point, if I just give my Lady the references 12 on my schedule to where express obligations of 13 confidentiality are, other than Mr Huband. So if we 14 move on to Begbies, you will see there, the second item 15 there, and that's provided, and then for ARC --</p> <p>16 MRS JUSTICE ANDREWS: Yes: 17 "Specific undertakings evidently provided [I don't 18 know what that's supposed to mean, it looks like an 19 inference being drawn] ...as the overseeing author 20 evidently provided each of them ... will have agreed to 21 similar assurances."</p> <p>22 I mean, that's not clear evidence that he's done 23 anything, it's speculation, it's an assumption that he 24 would have done it because that's the way it's done.</p> <p>25 MR GEORGE: I think from the preceding paragraph, if we just</p> <p style="text-align: center;">Page 42</p>	<p>1 that relates to -- I am sure it comes up for each of my 2 clients. There will be people who do not require to 3 have confidentiality, who were not promised 4 confidentiality, whose identity was disclosed to Rio 5 Tinto and who Rio Tinto know about and who have 6 disclosed that material to Vale.</p> <p>7 MRS JUSTICE ANDREWS: What we are really dealing with is 8 sources of information in the report that were not 9 revealed -- those sources were not in fact revealed to 10 Rio Tinto.</p> <p>11 MR GEORGE: Never.</p> <p>12 MRS JUSTICE ANDREWS: So at the time when Rio Tinto had the 13 reports, they themselves, whether or not they had 14 a contractual right to call for it, did not in fact know 15 who provided that information to them -- to their 16 business associates -- and were unable there, on the 17 basis of that, to evaluate, use that information to 18 evaluate the quality of the information.</p> <p>19 MR GEORGE: Precisely. They had what they had and nothing 20 in this argument is about anything that Rio Tinto ever 21 had at any material time. Never was anything that I am 22 trying to protect, within Rio Tinto's knowledge.</p> <p>23 Finally, my Lady, ARC, African Risk. You will see 24 the principal evidence from Ms O'Connor at the top of 25 page 2:</p> <p style="text-align: center;">Page 44</p>

<p>1 "I confirm that each of ARC" ... produced for Rio  2 Tinto received an assurance their identity would not be  3 disclosed ... when they first began working with ARC."  4 MRS JUSTICE ANDREWS: What it boils down to is apart from  5 the two layers of associates and sources that one has in  6 Livingstone's case, are a network of individuals who are  7 providing information, all of whom are said to have  8 received specific assurances that their identities will  9 not be disclosed. Insofar as the associates are  10 journalists, they would of course be the usual  11 journalists, subject to the usual journalistic source of  12 confidentiality, which is a matter of public policy in  13 this jurisdiction, is expressly protected, for very good  14 public policy reasons.  15 In other cases, perhaps the quality of the  16 information doesn't expose them to quite the same  17 dangers but what you have is a complete range.  18 MR GEORGE: Precisely, my Lady.  19 MRS JUSTICE ANDREWS: But your main point is everybody was  20 given an express assurance. Then the reputations of the  21 three businesses concerned will take a hit, if it's  22 found that as a result of a court order, they have had  23 to disclose it. I am not quite sure why it makes  24 a difference to their reputation if they find that  25 having valiantly resisted disclosure, they're forced to</p> <p style="text-align: center;">Page 45</p>	<p>1 stand and we currently see it, we see no basis upon  2 which they should be disclosed. They are, on our  3 submission, of no relevance to the US proceedings. At  4 best, on my learned friend's case, of the most marginal  5 and tangential relevance and in those circumstances, it  6 would be extremely serious for the business.  7 Fourthly, my Lady, and finally, in these categories,  8 is the journalistic analogy, if I put it that way. It  9 is an important one to bear in mind. For the reasons  10 I have given, I am not going to stand up and say, you  11 know, they are identical to journalists, it is  12 a different industry, nor does the fact they are  13 journalists in a different context --  14 MRS JUSTICE ANDREWS: One has to live in the real world.  15 This is evidence or intelligence gathering in a country  16 where there may not be the same respect for life and  17 limb as elsewhere.  18 MR GEORGE: Precisely.  19 MRS JUSTICE ANDREWS: One has to take judicial notice of  20 that.  21 MR GEORGE: And, equally, where the number of people who  22 have sufficient knowledge in that country, and thus to  23 act as journalists or intelligence gatherers or  24 assistants -- and you have seen from the evidence that  25 much of the work my clients do is for government bases</p> <p style="text-align: center;">Page 47</p>
<p>1 disclose it into a confidentiality agreement.  2 MR GEORGE: Well, my Lady, I will address on the various  3 subheadings. My Lady is right to characterise the  4 different natures of the argument are these. Firstly  5 and importantly, the express promise of confidentiality  6 to anyone.  7 Secondly, the evidence of risk to life, limb,  8 property, and in my schedule I have attempted to  9 summarise each of these within each category.  10 Thirdly, evidence of the damages to business  11 reputation.  12 In our submission -- I take my Lady's point, but the  13 submission is that once it is held that an express  14 promise of confidentiality is, on this hypothesis, not  15 given sufficient weight to be upheld by a court, then  16 notwithstanding the court's attempts to protect it --  17 and I understand what -- the protect orders the courts  18 can and do put in place, but as my Lady herself observed  19 and we all know from practice, leaks can and do happen,  20 even with the best will in the world, let alone  21 deliberate ones -- that will severely restrict people's  22 confidence in the services which not only my three  23 clients but in fact the business intelligence community  24 as a whole can provide. And obviously we would say,  25 particularly so, in situations where as we currently</p> <p style="text-align: center;">Page 46</p>	<p>1 and formal public bodies, are likely to be the same  2 people. There are not that many people who can provide  3 an informed assessment of any particular political issue  4 within Guinea and as my Lady says, can clearly take  5 judicial notice of the nature of that particular country  6 in its recent modern history.  7 So my Lady, those are --  8 MRS JUSTICE ANDREWS: What are you actually asking for,  9 Mr George, in terms of the court order? You want  10 a carte blanche redaction?  11 MR GEORGE: Well my Lady, I don't put it as -- I wouldn't  12 characterise it as carte blanche. If we go to the blue  13 file, if that's convenient, tab 4. It's the Livingstone  14 file, tab 4.  15 MRS JUSTICE ANDREWS: "Not required to produce any copies of  16 documents nor any evidence which may infringe any duty  17 of confidentiality."  18 That's going to need much more specificity, isn't  19 it?  20 MR GEORGE: My Lady, I agree and let me immediately say that  21 "shall not be required to produce" means to be required  22 to produce in redacted form. We are not suggesting that  23 we simply say: you cannot have the document.  24 The "infringe any duty of confidentiality" relates  25 to only one aspect of that duty and that is clear from</p> <p style="text-align: center;">Page 48</p>

<p>1 the next line:</p> <p>2 "It is information regarding disclosure of the</p> <p>3 identity of the source."</p> <p>4 MRS JUSTICE ANDREWS: It would be better, would it not, to</p> <p>5 vary the order so as to permit redaction of the</p> <p>6 documents for a specific purpose?</p> <p>7 MR GEORGE: Yes.</p> <p>8 MRS JUSTICE ANDREWS: And maybe on particular terms. I will</p> <p>9 hear what Ms Cockerill will have to say but if I were</p> <p>10 with you, one possibility would be for me to say</p> <p>11 "I permit you to redact the documents so as to remove</p> <p>12 any information which would lead directly or indirectly</p> <p>13 to the disclosure of the identity of the source."</p> <p>14 Then I might, however, require that there is</p> <p>15 a generic description along the lines of what is said in</p> <p>16 Mr Huband's statement, so that we know that it's</p> <p>17 source I or source A or source X.</p> <p>18 MR GEORGE: My Lady, yes. As I have said, we would be</p> <p>19 prepared and entirely see the force of an argument that</p> <p>20 the redactions should be justified as much as possible</p> <p>21 without breaching the very purpose for which the</p> <p>22 protection was provided, in order that the evidence can</p> <p>23 be tested and both the justifications can be considered</p> <p>24 and any further application of the disclosure of sources</p> <p>25 can be predicated on a specific application as to why</p> <p style="text-align: center;">Page 49</p>	<p>1 goes too far but that will be a forum, as it were, in</p> <p>2 which a further, more forensic analysis could take</p> <p>3 place, without having --</p> <p>4 MRS JUSTICE ANDREWS: That puts the examiner in a very</p> <p>5 difficult position because, normally, when you take</p> <p>6 objections to questions, the way that it's done, in my</p> <p>7 experience, is that the examiner allows the question to</p> <p>8 be answered and it then goes back to the home court to</p> <p>9 rule on whether or not that information is admissible or</p> <p>10 not.</p> <p>11 MR GEORGE: That is the difficulty with that. I was putting</p> <p>12 it as an option just so that -- but the difficulty with</p> <p>13 it not being resolved at my Lady's level, if I can put</p> <p>14 it that way, is it doesn't have the --</p> <p>15 MRS JUSTICE ANDREWS: The scope of the disclosure or the</p> <p>16 scope of the disclosure pursuant to the letters of</p> <p>17 request, I think is something I have to grasp with a</p> <p>18 nettle on today because otherwise it puts both parties</p> <p>19 in an impossible position when it comes to the</p> <p>20 cross-examination of the witnesses. If Ms Cockerill is</p> <p>21 going to be doing it, then she won't know what questions</p> <p>22 she's allowed to ask and what she is not allowed to ask.</p> <p>23 MR GEORGE: I think my learned friend has nominated others</p> <p>24 from her instructing solicitors to conduct it.</p> <p>25 But my Lady, yes, so our primary position, for the</p> <p style="text-align: center;">Page 51</p>
<p>1 this individual, in relation to the very issue which he</p> <p>2 purported to speak to or however Ms Cockerill wants to</p> <p>3 put it, my learned friend wants to put it, but that</p> <p>4 would be a much more satisfactory and proportionate way</p> <p>5 of proceeding than effectively having these names out</p> <p>6 there, regardless really, of -- without any analysis of</p> <p>7 what issue they might be relevant to, in which case, as</p> <p>8 it were, the --</p> <p>9 MRS JUSTICE ANDREWS: Well there is the halfway house.</p> <p>10 I could either say: well for the time being you are</p> <p>11 permitted to do that, and give liberty to apply to come</p> <p>12 back with precise evidence as to why the disclosure of</p> <p>13 the name of that individual is key. Or I can say no.</p> <p>14 Because at the end of the day, as a matter of</p> <p>15 discretion, I have to consider the balancing exercise in</p> <p>16 relation to confidentiality. Or I could say yes.</p> <p>17 MR GEORGE: Yes, my Lady. Or just to add to my Lady's</p> <p>18 options, my Lady could say: well I am going to permit</p> <p>19 the redactions with or without justifications. I know</p> <p>20 there is going to be an oral examination of at least two</p> <p>21 witnesses because Mr Huband and Ms O'Connor are not</p> <p>22 objecting to being there. Questions will obviously --</p> <p>23 can be asked about the material that has been provided</p> <p>24 and the redactions. Doubtless, as representatives, we</p> <p>25 will be there to make submissions if the questioning</p> <p style="text-align: center;">Page 50</p>	<p>1 reasons that I have given, is -- those are my</p> <p>2 submissions on the confidentiality but --</p> <p>3 MRS JUSTICE ANDREWS: What else is on the shopping list?</p> <p>4 There's specificity but I think that's something --</p> <p>5 MR GEORGE: I said I would look at both sides of the</p> <p>6 balancing scale so I also wanted to look very briefly at</p> <p>7 why the relevance to the US proceedings which obviously</p> <p>8 gets set against the confidentiality -- and let me make</p> <p>9 brief submissions in relation to what is going on in</p> <p>10 America.</p> <p>11 There are three points. The first is in relation to</p> <p>12 paragraph 68. If that is said to be in -- relevant,</p> <p>13 that it leads to --</p> <p>14 MRS JUSTICE ANDREWS: Sorry, 68 of?</p> <p>15 MR GEORGE: Mr Kelly's second witness statement. Sorry,</p> <p>16 I said that too fast:</p> <p>17 "The right to know the source's name on the basis</p> <p>18 that it will enable them to identify further, the</p> <p>19 identity and location of persons who know of any</p> <p>20 discoverable matter."</p> <p>21 MRS JUSTICE ANDREWS: That's British Westinghouse.</p> <p>22 MR GEORGE: My Lady, if I don't need to take you to British</p> <p>23 Westinghouse, I won't. But that is plainly out.</p> <p>24 MRS JUSTICE ANDREWS: You can't basically.</p> <p>25 MR GEORGE: The second basis, as my Lady has said, is</p> <p style="text-align: center;">Page 52</p>



<p>1 limitation. There are two submissions, the first of</p> <p>2 which my Lady has entirely articulated, which is how can</p> <p>3 anything that isn't in Rio Tinto's knowledge, be</p> <p>4 relevant? As I have made clear, nothing in this</p> <p>5 application, as far as confidentiality is concerned,</p> <p>6 relates to anything that Rio Tinto have ever had.</p> <p>7 Because anything that went to Rio Tinto, we entirely</p> <p>8 accept, is not something we can now seek to protect and</p> <p>9 we don't. That's why Rio Tinto were told of it because</p> <p>10 it didn't need protecting.</p> <p>11 Also on limitation, my Lady, there is quite an</p> <p>12 important date point that Mr Kelly seems to have</p> <p>13 ignored. Proceedings were issued on 30 April 2014.</p> <p>14 It's a four year limitation period, so the four years</p> <p>15 Rio Tinto had, go back to 30 April 2010. So any red</p> <p>16 flags after 30 April 2010 don't matter, they're within</p> <p>17 the four year period.</p> <p>18 The only relevance of limitation is what red flags</p> <p>19 Rio Tinto knew before 30 April 2010.</p> <p>20 Of the 19 reports which Livingstone produced, 18 of</p> <p>21 them fall outside the relevant period. All of the</p> <p>22 reports which Begbies produced, fall outside the</p> <p>23 relevant period.</p> <p>24 It is, we say, surprising that this wasn't drawn to</p> <p>25 the attention of the English court when they were asked</p> <p style="text-align: center;">Page 53</p>	<p>1 second witness statement at the exhibit, page 137 of</p> <p>2 Mr Kelly's exhibit --</p> <p>3 MRS JUSTICE ANDREWS: 137?</p> <p>4 MR GEORGE: Yes. You will see this is what I have called</p> <p>5 a justification table. What my learned friend's clients</p> <p>6 have tried to do is take each piece of information and</p> <p>7 justify why they need it.</p> <p>8 If one goes to page 140, item L, just to take an</p> <p>9 example, this is a request for documents referred to.</p> <p>10 My Lady will see a report dated 19 July 2010. So on any</p> <p>11 view, that was provided to Rio Tinto within the</p> <p>12 limitation period. It's said to be relevant, if one</p> <p>13 looks at the next entry:</p> <p>14 "These documents relating to Mr ... will demonstrate</p> <p>15 that Rio Tinto was well aware of any red flags with</p> <p>16 respect ... bribery of government officials well</p> <p>17 before April 2010."</p> <p>18 It is beyond us how a report received after</p> <p>19 19 July 2010 by Rio Tinto, can conceivably tell anything</p> <p>20 about what Rio Tinto knew before April 2010.</p> <p>21 MRS JUSTICE ANDREWS: It depends what's in the report,</p> <p>22 doesn't it? Because the fact the report may be actually</p> <p>23 provided at a later date, the contents of the report may</p> <p>24 relate to events that have occurred at an earlier stage</p> <p>25 and it may narrate those events. So I can see that the</p> <p style="text-align: center;">Page 55</p>
<p>1 to make this order because there's a material difference</p> <p>2 between the quality of the material in relation to --</p> <p>3 MRS JUSTICE ANDREWS: It's a bit late now, isn't it, because</p> <p>4 the US courts made the letter of request in relation to</p> <p>5 this material. It's the US court that should have been</p> <p>6 told this is out of --</p> <p>7 MR GEORGE: My Lady, that may well be right but in any</p> <p>8 event --</p> <p>9 MRS JUSTICE ANDREWS: That's something that Rio Tinto should</p> <p>10 have done, it's a bit like shoving the stable door after</p> <p>11 the horse has bolted.</p> <p>12 MR GEORGE: I am not going to develop that. We reject</p> <p>13 entirely the submissions that we are in any way in</p> <p>14 collusion with Rio Tinto and indeed we would be</p> <p>15 equally -- and are equally aggrieved about Rio Tinto, as</p> <p>16 it were, in these actions. We understand there are</p> <p>17 billions of dollars at stake between two of the world's</p> <p>18 largest mining companies. We do not participate on that</p> <p>19 scale, we are simply trying to protect the identity of</p> <p>20 our businesses.</p> <p>21 But the position now, as appears absolutely quite</p> <p>22 clear, that the vast majority of information requested</p> <p>23 of Livingstone and all of that requested of Begbies</p> <p>24 Trainer, must be irrelevant to the limitation issue.</p> <p>25 It's probably worth highlighting, back in Mr Kelly's</p> <p style="text-align: center;">Page 54</p>	<p>1 date might actually be a bit of a red herring there.</p> <p>2 MR GEORGE: Only, my Lady, if what it related was some</p> <p>3 earlier knowledge of Rio Tinto.</p> <p>4 MRS JUSTICE ANDREWS: Yes.</p> <p>5 MR GEORGE: If that's the case, that's obviously been</p> <p>6 disclosed, I mean that's not been redacted --</p> <p>7 MRS JUSTICE ANDREWS: The reports are out there.</p> <p>8 MR GEORGE: The reports are out there. What's being said</p> <p>9 here is the information that Rio Tinto didn't have, that</p> <p>10 under the layer (?) report they received on 19 July</p> <p>11 could be relevant to what they knew on April 2010, and</p> <p>12 we simply cannot see how that could be correct.</p> <p>13 My Lady, finally, in relation to this, in terms of</p> <p>14 the -- perhaps I think what could fairly be called the</p> <p>15 catch all position that: oh, well something might turn</p> <p>16 up in relation to the overall merits, as it were, again,</p> <p>17 firstly, the fundamental point, the reports are out</p> <p>18 there. What they say about the merits, what knowledge</p> <p>19 there was in the report, is already in evidence in the</p> <p>20 US proceedings.</p> <p>21 MRS JUSTICE ANDREWS: Well the catch all is relevant,</p> <p>22 specifically, to the gaps. By "gaps" I mean any</p> <p>23 documents that Rio Tinto, or information Rio Tinto had</p> <p>24 which they say they no longer have and therefore don't</p> <p>25 have to disclose pursuant to the US court order. It may</p> <p style="text-align: center;">Page 56</p>

14 (Pages 53 to 56)

<p>1 be that they are within fairly short compass but I would</p> <p>2 have thought that's the category --</p> <p>3 MR GEORGE: In which case that is fine because that does not</p> <p>4 involve confidentiality. There's no objection on</p> <p>5 confidentiality with that, there's a wording point which</p> <p>6 we will discuss in the second issue. That doesn't</p> <p>7 matter for confidentiality. If that's the only point of</p> <p>8 the catch all, that goes nowhere, so we're left with</p> <p>9 a limitation point that simply cannot run because it</p> <p>10 cannot relate to Rio Tinto's knowledge and in most of</p> <p>11 the cases it postdates it.</p> <p>12 Anything else -- particularly, no one has yet</p> <p>13 articulated what any other relevance could it be --</p> <p>14 could at most be a fishing expedition on the sort</p> <p>15 of: you never know what may turn up that may be useful.</p> <p>16 MRS JUSTICE ANDREWS: It may not pertain to their knowledge</p> <p>17 but think about the section 32-type point, which has</p> <p>18 a special name in the US proceedings and I have now</p> <p>19 forgotten what it is, but the -- what you know or with</p> <p>20 reasonable diligence could have found out point.</p> <p>21 MS COCKERILL: Equitable tolling.</p> <p>22 MRS JUSTICE ANDREWS: Equitable tolling, thank you,</p> <p>23 Ms Cockerill. On the equitable tolling point, one of</p> <p>24 the enquiries is going to be whether or not Rio Tinto</p> <p>25 could, with reasonable diligence, have found out certain</p> <p style="text-align: center;">Page 57</p>	<p>1 So I think you have to go a bit wider than their</p> <p>2 actual knowledge. It's what they could, by taking</p> <p>3 reasonable steps, have found out at the time.</p> <p>4 MR GEORGE: My Lady, that must be right. The first</p> <p>5 submission on that is that, in my submission, is where</p> <p>6 the date point is clearly relevant because no orange</p> <p>7 flag of that nature, in my Lady's example, arising after</p> <p>8 30 April 2010, could give rise to that --</p> <p>9 MRS JUSTICE ANDREWS: Because it's within the four years.</p> <p>10 MR GEORGE: Precisely within the limitation period. That</p> <p>11 rules out all of Begbies, 18 of 19 of Livingstone and</p> <p>12 two of ARC. ARC do have material within the relevant</p> <p>13 period.</p> <p>14 Secondly, my Lady, obviously in a hypothesis where</p> <p>15 Rio Tinto didn't exercise clause 16.1, it is to put</p> <p>16 it -- a long way down the line to speculate as to what</p> <p>17 would have happened if they didn't. Ms Cockerill may</p> <p>18 win at first base. She may just say "You had</p> <p>19 clause 16.1", my construction may fail and that will be</p> <p>20 that, Rio Tinto didn't exercise it and they should have</p> <p>21 done. But it's quite some degrees of separation to say</p> <p>22 the court will start investigating. We know they didn't</p> <p>23 but if they had, what might they have done and what</p> <p>24 might that have revealed. And certainly no evidence</p> <p>25 before this court, although there could be, if one took</p> <p style="text-align: center;">Page 59</p>
<p>1 information. And, therefore, it does not just stop at</p> <p>2 Rio Tinto's actual knowledge, I can see an argument</p> <p>3 running along the basis: well you have clause 16, you</p> <p>4 could have utilised clause 16 to force the company to</p> <p>5 provide you with information that was, if you like,</p> <p>6 further and better particulars of the allegation in</p> <p>7 paragraph 63 of their report -- I take that paragraph as</p> <p>8 at random, I don't know how long the reports were, but</p> <p>9 let's say there's a particular passage in one of the</p> <p>10 reports that waves an orange flag, not necessarily a red</p> <p>11 one but an orange flag, and it looks a little bit iffy</p> <p>12 and if one then investigates the orange flag and it gets</p> <p>13 redder and redder and redder, so that with due</p> <p>14 diligence, Rio Tinto, by pursuing its contractual rights</p> <p>15 against your clients, could have found out that there</p> <p>16 was really a lot more to it than met the eye, that would</p> <p>17 advance Ms Cockerill's limitation case.</p> <p>18 On the other hand, if Rio Tinto wanted to rely on</p> <p>19 equitable tolling, they would have said: well we would</p> <p>20 have hit our heads against a brick wall because we would</p> <p>21 only have got as far as finding out the source of</p> <p>22 information was somebody that Livingstone were not</p> <p>23 prepared to tell us any more about without getting into</p> <p>24 trouble and we just hit a dead end and therefore we</p> <p>25 could not reliably rely upon this information.</p> <p style="text-align: center;">Page 58</p>	<p>1 a more incremental approach, perhaps in relation to</p> <p>2 a specific passage in a specific report in a specific</p> <p>3 individual, and that's likely to occur. And in my</p> <p>4 submission it's very much a sort of sledge hammer and</p> <p>5 nuts situation, to require that identity of a</p> <p>6 significant number of confidential sources to be</p> <p>7 disclosed, on the hypothesis that one of them might be</p> <p>8 relevant on that ground. If that were the case, one</p> <p>9 could make an application on a very specific and</p> <p>10 discrete basis, at a subsequent point.</p> <p>11 Finally, I have given you the reference of</p> <p>12 Mr Parkhouse 2, paragraph 9, to show that this is not</p> <p>13 our -- may I hand it up? I apologise, my Lady, it's for</p> <p>14 the blue file. Tab 10, just so my Lady has it.</p> <p>15 (Handed).</p> <p>16 MRS JUSTICE ANDREWS: Have I seen this before?</p> <p>17 MR GEORGE: My Lady, we have discussed it but possibly</p> <p>18 because it was in my schedule.</p> <p>19 MRS JUSTICE ANDREWS: Thank you. I think I might. I am not</p> <p>20 sure.</p> <p>21 MR GEORGE: It probably reached the court but not in an</p> <p>22 orderly form.</p> <p>23 MRS JUSTICE ANDREWS: I was handed a couple of extra things</p> <p>24 to put into the bundles this morning.</p> <p>25 MR GEORGE: Similarly, or to similar effect, Ms O'Connor's</p> <p style="text-align: center;">Page 60</p>

<p>1 second witness statement at paragraph 6.</p> <p>2 May I, with sincere apologies, hand it up again. It</p> <p>3 probably has reached you but just to show you one</p> <p>4 paragraph, it may be easier, my Lady. (Handed).</p> <p>5 MRS JUSTICE ANDREWS: That did come this morning, yes.</p> <p>6 MR GEORGE: So the relevance is the second sentence of</p> <p>7 paragraph 6:</p> <p>8 "Furthermore, ARC insisted at the outset of its</p> <p>9 engagement with Rio Tinto that its sources' identities</p> <p>10 remained confidential. Rio Tinto accepted it had no ...</p> <p>11 who are our sources."</p> <p>12 I appreciate, my Lady, that it's for another court,</p> <p>13 potentially, as to what, if anything, that would do to</p> <p>14 clause 16.1 but certainly that's the evidence before</p> <p>15 this court.</p> <p>16 MRS JUSTICE ANDREWS: Did they all sign 16.1?</p> <p>17 MR GEORGE: No, my Lady, I think it's merely a contract by</p> <p>18 incorporation. There was Rio Tinto's standard terms</p> <p>19 appear and there is --</p> <p>20 MRS JUSTICE ANDREWS: It's expressly governed by English</p> <p>21 law.</p> <p>22 MR GEORGE: My Lady, ARC didn't have the standard terms at</p> <p>23 all so clause --</p> <p>24 MRS JUSTICE ANDREWS: I thought that -- that was my</p> <p>25 understanding from reading Ms O'Connor, so it may well</p> <p style="text-align: center;">Page 61</p>	<p>1 "It is sometimes said that in taking this element</p> <p>2 into account, ie confidentiality, the court has to</p> <p>3 perform a balancing process. The metaphor is one well</p> <p>4 worn in the law but I doubt if it is more than a rough</p> <p>5 metaphor. Balancing can only take place between</p> <p>6 commensurables but here the process is to consider</p> <p>7 fairly the strength and value of the interest in</p> <p>8 preserving confidentiality and the damage which may be</p> <p>9 caused by breaking it, then to consider whether the</p> <p>10 objective to dispose fairly of the case can be achieved</p> <p>11 without doing so and only, in the last resort, to order</p> <p>12 discovery, subject, if need be, to protective</p> <p>13 measures ... more complex process than merely using the</p> <p>14 scales, it is an exercise in judicial judgment."</p> <p>15 I merely emphasise, my Lady, that it is not simply</p> <p>16 evaluating strengths and weaknesses of the</p> <p>17 confidentiality argument. Once you are satisfied, as</p> <p>18 I invite my Lady to be, that there is evidence of an</p> <p>19 express confidentiality promise to each of the</p> <p>20 associates and sources here, leave aside other factors</p> <p>21 that relate to that, one does have to tread very</p> <p>22 carefully about, can the case be disposed of justly</p> <p>23 without ordering disclosure, and in my submission the</p> <p>24 evidence simply does not come close to showing a</p> <p>25 likelihood that any of it is going to be relevant. And</p> <p style="text-align: center;">Page 63</p>
<p>1 be that ARC is in a slightly different position from</p> <p>2 everybody else. I certainly think that there is a very</p> <p>3 powerful argument that 16.1 puts paid to any obligation</p> <p>4 of confidentiality as between anyone who signed those</p> <p>5 terms and Rio Tinto. But if there was an express</p> <p>6 agreement and the evidence before me is that there was,</p> <p>7 with ARC, that they keep the sources confidential,</p> <p>8 that's a different matter.</p> <p>9 MR GEORGE: I draw that evidence to my Lady's attention.</p> <p>10 My Lady, may I have a moment to check I have covered</p> <p>11 the matters on that topic before moving on?</p> <p>12 MRS JUSTICE ANDREWS: Yes.</p> <p>13 MR GEORGE: (Pause) My Lady, the only other matter which ...</p> <p>14 at the risk of trying my Lady's patience, may I just --</p> <p>15 I have cited -- the classic English authority on the</p> <p>16 balancing test in this context is that of the House of</p> <p>17 Lords in Nasse in tab 3 of the authorities bundles. Is</p> <p>18 my Lady familiar with that or is it worth turning that</p> <p>19 up?</p> <p>20 MRS JUSTICE ANDREWS: I'm more familiar with Rio Tinto and</p> <p>21 Westinghouse. Nasse, I think I had better have a quick</p> <p>22 look at it.</p> <p>23 MR GEORGE: Just looking at 1067, letter D, this is the</p> <p>24 English law, as it were, confidentiality obligations in</p> <p>25 the context of disclosure:</p> <p style="text-align: center;">Page 62</p>	<p>1 certainly, if there was any possibility of it being</p> <p>2 relevant, no injustice will be done by my Lady ordering</p> <p>3 at this stage for redactions to be permitted,</p> <p>4 explanations to be provided, if my Lady thinks it is</p> <p>5 appropriate, so there can be further testing of them</p> <p>6 with specific applications in the future, if necessary,</p> <p>7 about specific individuals, by reference to a specific</p> <p>8 passage in a report.</p> <p>9 At the moment -- and I am not going to traverse the</p> <p>10 contents of the report -- it will be obvious to my Lady</p> <p>11 from the width of the letter of request, effectively</p> <p>12 anything that could, as it were, look like it might have</p> <p>13 had some underlying information, that has been asked</p> <p>14 about and that is not in my submission, satisfactory or</p> <p>15 proportionate.</p> <p>16 MRS JUSTICE ANDREWS: Yes.</p> <p>17 MR GEORGE: My Lady, those are my submissions on what is by</p> <p>18 far the most important point. Would my Lady like me to</p> <p>19 address here on subsidiary matters?</p> <p>20 MRS JUSTICE ANDREWS: Let's go through the shopping list and</p> <p>21 see what else you need me to determine. The parties,</p> <p>22 I think to a large extent, are moving towards some form</p> <p>23 of common ground in terms of the width of the</p> <p>24 documentation, or the specificity of the documentation.</p> <p>25 MR GEORGE: Two have been conceded, there are three</p> <p style="text-align: center;">Page 64</p>

16 (Pages 61 to 64)

<p>1 categories which we say still are impermissibly wide by</p> <p>2 reference to -- my Lady will be familiar with the test</p> <p>3 of -- each individual document does not have to be</p> <p>4 described but --</p> <p>5 MRS JUSTICE ANDREWS: But generically sufficiently clear.</p> <p>6 It's Lord Justice Moore Bick.</p> <p>7 MR GEORGE: Perhaps if one just highlights the objected to</p> <p>8 phrases and my Lady may then be able to determine the</p> <p>9 matters relatively speedily. Obviously at my Lady's</p> <p>10 convenience.</p> <p>11 If one goes to the order itself, which is -- I am</p> <p>12 back in my favourite blue bundle at tab 3 -- so my Lady,</p> <p>13 if one just picks up C, you will see:</p> <p>14 "The bills or invoices, including the timesheets</p> <p>15 ..."</p> <p>16 That's all fine:</p> <p>17 "... or records of activities performed by you ..."</p> <p>18 It's just that "records of activities" which we say</p> <p>19 is too wide, in that what it could encompass, in</p> <p>20 a sense, being any memorandum or evidence of anything</p> <p>21 done, is A, wide and B, leaves the hypothetical and</p> <p>22 objective recipient somewhat scratching their head as to</p> <p>23 how they are supposed to identify, particularly at</p> <p>24 a remove in time, what does and doesn't --</p> <p>25 MRS JUSTICE ANDREWS: It's records that are backing up the</p> <p style="text-align: center;">Page 65</p>	<p>1 debating, which are the ones which Rio Tinto say we</p> <p>2 haven't got them any more and Rio Tinto say they haven't</p> <p>3 got them, but you have to go to the source to find out</p> <p>4 what else was provided. So it's anything that you</p> <p>5 provided to Rio Tinto in connection with the reports</p> <p>6 that you provided to Rio Tinto; in other words, anything</p> <p>7 that was annexed to them or provided at their request.</p> <p>8 MR GEORGE: Well, my Lady, what has been suggested --</p> <p>9 I don't want to push this because my Lady has the</p> <p>10 point -- perhaps I can take it from my skeleton argument</p> <p>11 rather than handing up another letter because I have</p> <p>12 quoted it there.</p> <p>13 MRS JUSTICE ANDREWS: Yes.</p> <p>14 MR GEORGE: There's no objection to filling the gaps. We</p> <p>15 are quite happy to do that. It's really only about the</p> <p>16 width of what this would require in terms of --</p> <p>17 MRS JUSTICE ANDREWS: Where in your skeleton, Mr George?</p> <p>18 MR GEORGE: I'm at paragraph 19.2.</p> <p>19 MRS JUSTICE ANDREWS: Yes.</p> <p>20 MR GEORGE: "Documents covered by category would include</p> <p>21 material such as pitch material ...(Reading to the</p> <p>22 words)... work that resulted or stems from any of the</p> <p>23 reports or had correspondence in connection with such</p> <p>24 work ... itemised bills like time records ... those</p> <p>25 documents would be responsive."</p> <p style="text-align: center;">Page 67</p>
<p>1 bills or invoices is what's being asked for, isn't it?</p> <p>2 So records of the activities leading to those charges,</p> <p>3 I would have thought, is the way to do it.</p> <p>4 MR GEORGE: That sort of specificity is what we haven't got</p> <p>5 yet. As it is drafted --</p> <p>6 MRS JUSTICE ANDREWS: That's clearly what it's aimed at,</p> <p>7 Mr George, is it's the bills or invoices, including</p> <p>8 timesheets, well timesheets speaks for themselves, but</p> <p>9 there may not be timesheets but there would be some kind</p> <p>10 of back up documentation that is provided in order to</p> <p>11 generate the bill or the invoice, because in order to be</p> <p>12 able to compute how much is charged, one would have to</p> <p>13 have some sort of record of what was done to generate</p> <p>14 that charge. So I am sure there's a form of wording</p> <p>15 that could be agreed between you that spells that out in</p> <p>16 words of one syllable but I think that's what "records</p> <p>17 of activities" is aimed at.</p> <p>18 MR GEORGE: If that's right, I don't understand there will</p> <p>19 be an objection to it being specified in a way we can</p> <p>20 collate.</p> <p>21 MRS JUSTICE ANDREWS: So that deals with that one. What is</p> <p>22 the next one that's controversial?</p> <p>23 MR GEORGE: E.</p> <p>24 MRS JUSTICE ANDREWS: E is straightforward, isn't it?</p> <p>25 That's the group of documents that we have been</p> <p style="text-align: center;">Page 66</p>	<p>1 So it is very much a catch all of matters material</p> <p>2 and immaterial, administrative and substantive and</p> <p>3 whilst I entirely appreciate the importance of</p> <p>4 practicality, there is also a legal principle here, on</p> <p>5 the compendious description.</p> <p>6 MRS JUSTICE ANDREWS: Well compendious description is too</p> <p>7 generic, you cannot have it is the legal point.</p> <p>8 MR GEORGE: Also what exactly is being described because</p> <p>9 this is not a description of a document in any way,</p> <p>10 shape or form. A document shared with Rio Tinto is</p> <p>11 a description of something that happened to that</p> <p>12 document during the course of its life.</p> <p>13 In my submission that actually falls out with the</p> <p>14 test entirely. You have to define it and describe it by</p> <p>15 reference to some innate characteristic of that</p> <p>16 document.</p> <p>17 MRS JUSTICE ANDREWS: Is that right? Provided it's a class,</p> <p>18 it falls within a class, the difficulty is actually</p> <p>19 finding out -- it is going to put you to a lot of</p> <p>20 trouble, no doubt, to find out what exactly was passed</p> <p>21 on, but what they're really getting at is the gaps,</p> <p>22 I think, and any correspondence passing between the</p> <p>23 parties in relation to the work that was done.</p> <p>24 MR GEORGE: My Lady, that is --</p> <p>25 MRS JUSTICE ANDREWS: Again, it seems to me that that can be</p> <p style="text-align: center;">Page 68</p>

<p>1 cured by drilling it down to correspondence generated --</p> <p>2 correspondence between your client and Rio Tinto</p> <p>3 concerning the reports, including any correspondence in</p> <p>4 relation to queries or requests for amplification. And</p> <p>5 any documents that were supplied to Rio Tinto, whether</p> <p>6 or not at their request, relating to the work that was</p> <p>7 done, that's the subject of the reports.</p> <p>8 MR GEORGE: My Lady, yes, I'm grateful.</p> <p>9 MRS JUSTICE ANDREWS: So that's really what that is driving</p> <p>10 at. It doesn't seem to me that -- you have the bills,</p> <p>11 invoices, you've got the bank statements, you've got the</p> <p>12 back up to the bills, the records relating to that, it's</p> <p>13 really -- I think they're also concerned to find out</p> <p>14 whether you still have back up records of what you sent</p> <p>15 to Rio Tinto.</p> <p>16 MR GEORGE: My Lady, we entirely see the force in filling</p> <p>17 the gaps, we entirely accept Rio Tinto's knowledge is</p> <p>18 relevant and this is merely just about making sure --</p> <p>19 MRS JUSTICE ANDREWS: Documents evidencing what was sent to</p> <p>20 Rio Tinto, correspondence passed on between the parties</p> <p>21 and anything back up that relates to the reports</p> <p>22 themselves.</p> <p>23 So if, in conjunction with the report, there was</p> <p>24 a paragraph which referred to another document and you</p> <p>25 sent a copy of that document, and Rio Tinto haven't</p> <p style="text-align: center;">Page 69</p>	<p>1 ..."</p> <p>2 Again, to describe, by reference to something which</p> <p>3 happened to the documents, which is difficult to verify,</p> <p>4 difficult, historically, to recreate, we say falls out</p> <p>5 with the legal test.</p> <p>6 MRS JUSTICE ANDREWS: Well, I think again there is a finding</p> <p>7 that is made in a particular paragraph and what is being</p> <p>8 asked for is what material, what other raw materials in</p> <p>9 your possession that led to you make that finding.</p> <p>10 I think that's clear enough. That's a generic</p> <p>11 description, it's the back up for that finding.</p> <p>12 MR GEORGE: Yes my Lady, and there's a formulation that</p> <p>13 reformulates that --</p> <p>14 MRS JUSTICE ANDREWS: I, personally, don't think it's too</p> <p>15 wide. I mean it seemed to me that it's quite clear that</p> <p>16 what that's aimed at is: you have made a finding in this</p> <p>17 report, we want to see any documents or any information</p> <p>18 that you have in your possession that led you to make</p> <p>19 that finding.</p> <p>20 MR GEORGE: It would be in my learned friend's gift as to</p> <p>21 whether we will rely on the previous formulation but</p> <p>22 those are the parameters.</p> <p>23 MRS JUSTICE ANDREWS: If you want to make it more specific</p> <p>24 so it helps you --</p> <p>25 MR GEORGE: It merely gives us comfort that it will not be</p> <p style="text-align: center;">Page 71</p>
<p>1 disclosed it but you have a copy, you have to disclose</p> <p>2 it.</p> <p>3 MR GEORGE: Exactly. It's the width, not the principle, but</p> <p>4 as my Lady has said, that is something that drafting</p> <p>5 should be able to -- in the light of this exchange --</p> <p>6 MRS JUSTICE ANDREWS: Then there's a third class, I think.</p> <p>7 MR GEORGE: I believe it's F. Let me just check on my page.</p> <p>8 No, F has been conceded. I apologise, my Lady.</p> <p>9 MRS JUSTICE ANDREWS: You are whingeing about producing bank</p> <p>10 statements but --</p> <p>11 MR GEORGE: No, my Lady, that's been conceded. Before you</p> <p>12 encourage my learned friend to give an indication --</p> <p>13 MRS JUSTICE ANDREWS: Right.</p> <p>14 MR GEORGE: H is the last one "but I understand in</p> <p>15 correspondence, alternative formulation has been put</p> <p>16 forward ... " The reference, just so my Lady has my</p> <p>17 submissions, does one see paragraph H at the bottom of</p> <p>18 page 5 of the letter of request?</p> <p>19 MRS JUSTICE ANDREWS: Yes.</p> <p>20 MR GEORGE: "The documents, including interview memoranda</p> <p>21 [nothing wrong with that] which you relied on for the</p> <p>22 finding ... "</p> <p>23 And, again, we have no problem with interview</p> <p>24 memoranda, that's a specified description:</p> <p>25 "... but the documents included which you relied on</p> <p style="text-align: center;">Page 70</p>	<p>1 said at some dates: here -- reliance will be argued</p> <p>2 upon: "The alternative ... memoranda refers to documents</p> <p>3 provided to or received from the sources who were</p> <p>4 interviewed ..."</p> <p>5 MRS JUSTICE ANDREWS: The real difficulty is the person</p> <p>6 asking the question doesn't actually know what the</p> <p>7 documents are you relied on, and so the only way of</p> <p>8 giving it a generic description is to do it by reference</p> <p>9 to the use that was made of them. I don't see that as</p> <p>10 falling outside of the general principle provided, that</p> <p>11 it is clearly pinned to that particular paragraph in</p> <p>12 your report.</p> <p>13 So somebody somewhere must know where the source of</p> <p>14 the finding is to be found, presumably the person who</p> <p>15 compiled the report. More difficulties if that person</p> <p>16 has left you.</p> <p>17 MR GEORGE: My Lady, I doubt that will cause a drafting</p> <p>18 difficulty in due course.</p> <p>19 Just one more set of categories, specific purely to</p> <p>20 ARC, so I'm afraid it's the ARC bundle, tab 3.</p> <p>21 MRS JUSTICE ANDREWS: Yes. Remind me which one is the ARC</p> <p>22 bundle?</p> <p>23 MR GEORGE: It's white in mine.</p> <p>24 MRS JUSTICE ANDREWS: I am just going to put the blue one</p> <p>25 away for the time being, before I rain my papers on the</p> <p style="text-align: center;">Page 72</p>

18 (Pages 69 to 72)



<p>1 associate or the court clerk.</p> <p>2 MR GEORGE: I am sure she will enjoy handing them back to</p> <p>3 counsel at the end of the hearing.</p> <p>4 MRS JUSTICE ANDREWS: Something is going to be said about</p> <p>5 costs, yes. The ARC bundle is ... I don't know which is</p> <p>6 the ARC bundle.</p> <p>7 MR GEORGE: It has Sheridans on my spine and probably on</p> <p>8 yours, my Lady.</p> <p>9 MRS JUSTICE ANDREWS: I have a Sheridans bundle here, yes.</p> <p>10 MR GEORGE: So it's the letter of request, schedule A, which</p> <p>11 is the documents. Three, what in my submission are</p> <p>12 fairly described as catch alls that we object to.</p> <p>13 So J --</p> <p>14 MRS JUSTICE ANDREWS: Actually, I still don't have the</p> <p>15 Sheridans bundle. (Pause) I am sorry about this</p> <p>16 Mr George, I do not have the Sheridans bundle. I have</p> <p>17 everything but. I have a lot of loose files but I don't</p> <p>18 actually have that bundle.</p> <p>19 MR GEORGE: May I hand up a relatively clean copy. It's</p> <p>20 clean on the material pages, as it were, I do not think</p> <p>21 there's anything controversial on it. (Handed).</p> <p>22 MRS JUSTICE ANDREWS: Thank you, yes.</p> <p>23 MR GEORGE: J, my Lady sees:</p> <p>24 "Any other documents providing a basis for or</p> <p>25 concerning your findings are set forth in your report."</p> <p style="text-align: center;">Page 73</p>	<p>1 documents in relation to this had been collected by</p> <p>2 Ms O'Connor and were therefore not in issue effectively.</p> <p>3 Because under the principle of Lee and Angus (?) , if</p> <p>4 you have actually collected the documents, you cannot</p> <p>5 then say they are too hard to find.</p> <p>6 MRS JUSTICE ANDREWS: It's not a question of saying they are</p> <p>7 too hard to find, it's saying they are too generically</p> <p>8 wide to describe, but I must admit it's a little</p> <p>9 difficult to say: we don't know what documents we're</p> <p>10 supposed to collect, if they have already collected</p> <p>11 them.</p> <p>12 MS COCKERILL: If the policy underlying the test, which is</p> <p>13 that the witness must not be in any doubt as to what he</p> <p>14 is going to do, he must be tearing his hair out, if that</p> <p>15 is the policy underlying the test, then once you have</p> <p>16 a witness who says: well I have the documents, they</p> <p>17 cannot be allowed to say: well I have the documents,</p> <p>18 we're not going to show you, because I think it's</p> <p>19 particularly wrong.</p> <p>20 MRS JUSTICE ANDREWS: Mr George, I think we need to go back</p> <p>21 and find out whether or not these documents have been</p> <p>22 collated. If they have been collated, I think you are</p> <p>23 obliged to produce them.</p> <p style="text-align: center;">Submissions by MR GEORGE</p> <p>25 MR GEORGE: My Lady, I would not accept that and there is</p> <p style="text-align: center;">Page 75</p>
<p>1 We say that is too generic and indeed the very</p> <p>2 formulation "any other" and -- I apologise, my Lady, as</p> <p>3 it has been conceded as Mr Hirst reminds me, then I do</p> <p>4 not dwell upon that one.</p> <p>5 MRS JUSTICE ANDREWS: Right.</p> <p>6 MR GEORGE: Q I think is still in play. There's only two to</p> <p>7 go, I will just identify them for my Lady. The</p> <p>8 documents concerning or relating to any other real</p> <p>9 estate owned directly or indirectly by Mr Thiam.</p> <p>10 And Y:</p> <p>11 "Any other documents reviewed, received or prepared</p> <p>12 in connection with the reports, including the</p> <p>13 documents --"</p> <p>14 MRS JUSTICE ANDREWS: Y falls --</p> <p>15 MR GEORGE: Y is not pursued either, I'm grateful.</p> <p>16 MRS JUSTICE ANDREWS: What's the problem with Q, it's too</p> <p>17 wide, anything to do with any real estate.</p> <p>18 MR GEORGE: Precisely, my Lady.</p> <p>19 MRS JUSTICE ANDREWS: It does seem a bit wide.</p> <p>20 Ms Cockerill, what about Q?</p> <p style="text-align: center;">Submissions by MS COCKERILL</p> <p>22 MS COCKERILL: Well my Lady --</p> <p>23 MRS JUSTICE ANDREWS: Is there any way we can make it more</p> <p>24 specific, what is that actually driving at?</p> <p>25 MS COCKERILL: I have to say, my Lady, I had understood that</p> <p style="text-align: center;">Page 74</p>	<p>1 a debate one could have on that 19th century first</p> <p>2 instance authority and indeed there's a relevant passage</p> <p>3 about it in my learned friend's book but may I take</p> <p>4 instructions about that before I go down that ...</p> <p>5 MRS JUSTICE ANDREWS: It may well be the pragmatic solution</p> <p>6 is to hand over what you have collated and to rule that</p> <p>7 that's all you have to hand over.</p> <p>8 MR GEORGE: Precisely. Let me take instructions over the</p> <p>9 short adjournment before I go down that interesting but</p> <p>10 possibly not material digression.</p> <p>11 So, my Lady, I am extremely grateful. The only</p> <p>12 other issue on my shopping list is the slightly</p> <p>13 different position of Begbies. Begbies have a witness</p> <p>14 who was ordered for cross-examination --</p> <p>15 MRS JUSTICE ANDREWS: Who is going to be sitting there</p> <p>16 saying "I don't know, I don't know". Well it will be</p> <p>17 a very short cross-examination.</p> <p>18 MR GEORGE: If I just hand up one letter, just so you have</p> <p>19 the complete correspondence. This was, until 4 o'clock</p> <p>20 yesterday or whenever we received my learned friend's</p> <p>21 skeleton argument, (Handed), where the correspondence</p> <p>22 rested.</p> <p style="text-align: center;">The second paragraph:</p> <p>24 "We write to inform you that we will consent to your</p> <p>25 application ... as against Mr John Humphrey on the</p> <p style="text-align: center;">Page 76</p>

<p>1 agreed basis there will be no ...(Reading to the</p> <p>2 words)... to this effect."</p> <p>3 Now I accept it appears from my learned friend's</p> <p>4 skeleton argument that she does want to cross-examine</p> <p>5 him but what has happened is that the basis for the</p> <p>6 cross-examination has now changed. What the American</p> <p>7 court requested this court to ask Mr Humphrey to be</p> <p>8 cross-examined about was issues relevant to the</p> <p>9 proceedings and even if my learned friend wanted this</p> <p>10 formulation, that does not include: what can you tell us</p> <p>11 about the administrative resources of your company?</p> <p>12 Insofar as the purpose of the cross-examination is</p> <p>13 to ask him where documents are, ie questions which might</p> <p>14 lead to the discoverability of other discoverable</p> <p>15 documents --</p> <p>16 MRS JUSTICE ANDREWS: You are back into Westinghouse.</p> <p>17 MR GEORGE: -- we are back into British Westinghouse. So</p> <p>18 whilst this deal may not have been done, so my learned</p> <p>19 friend may be entitled to ask for Mr Humphrey to turn</p> <p>20 up, he should not be ordered to do so, it is not</p> <p>21 a proper basis anymore, for him to be ordered to do so</p> <p>22 and I have set out in my skeleton argument the</p> <p>23 uncontroversial position at paragraph 18.5:</p> <p>24 "It must be shown that the proposed witness who is</p> <p>25 to give oral evidence has relevant evidence to give."</p> <p style="text-align: center;">Page 77</p>	<p>1 trouble them, as it were.</p> <p>2 My Lady, unless I can assist you further, those were</p> <p>3 my items.</p> <p>4 MRS JUSTICE ANDREWS: Right. Thank you very much, Mr George</p> <p>5 Ms Cockerill?</p> <p>6 Submissions by MS COCKERILL</p> <p>7 MS COCKERILL: My Lady, would it be sensible if I just tied</p> <p>8 up those request points first?</p> <p>9 I think we are more or less there in relation to C</p> <p>10 and E, the ones which you discussed a rewording with my</p> <p>11 learned friend, so I probably don't need to address you</p> <p>12 on that. We have also discussed the position as regards</p> <p>13 Ms O'Connor's statement that she's gathered materials.</p> <p>14 So what we are really left with, I think, unless</p> <p>15 your Ladyship had any further questions, is Mr Humphrey</p> <p>16 and BGT.</p> <p>17 In relation to Mr Humphrey, the position is</p> <p>18 this: for each of the witnesses, what you have</p> <p>19 effectively got is a dual letter of request.</p> <p>20 Your Ladyship will of course be aware that the letter of</p> <p>21 request to produce documents is akin to the old subpoena</p> <p>22 ducestecum, and the old subpoena ducestecum the</p> <p>23 documents didn't come by themselves, they came attached</p> <p>24 to a witness. So for each set of documents you do,</p> <p>25 effectively, have to tender somebody and there is</p> <p style="text-align: center;">Page 79</p>
<p>1 Now as far as the document order is concerned</p> <p>2 against Begbies, a point is taken in my learned friend's</p> <p>3 skeleton argument that although we have produced a nil</p> <p>4 return, there is a further word search we should do</p> <p>5 because there may have been a slightly --</p> <p>6 MRS JUSTICE ANDREWS: A different project name, yes.</p> <p>7 MR GEORGE: I am instructed we are content to do the</p> <p>8 search -- I think it's Blackbird and Raven or something</p> <p>9 like that. So we don't press for discharge today.</p> <p>10 Begbies obviously adopt all the other submissions in</p> <p>11 relation to ARC and Livingstone on all of the other</p> <p>12 points we have debated but we will, as it were, do that</p> <p>13 search --</p> <p>14 MRS JUSTICE ANDREWS: I think a form of words can be put</p> <p>15 into the court order which requires you to carry out</p> <p>16 a word search under other keywords, which can be agreed,</p> <p>17 and if that turns up nothing, so be it.</p> <p>18 MR GEORGE: Precisely.</p> <p>19 MRS JUSTICE ANDREWS: If it turns up something that's</p> <p>20 relevant, you will give it.</p> <p>21 MR GEORGE: We are content to do that but we do press for</p> <p>22 the order against Mr Humphrey to attend for cross</p> <p>23 because there is no proper basis for it. We have, I am</p> <p>24 reminded, identified -- they no longer work for us but</p> <p>25 the relevant people who would know something, Vale can</p> <p style="text-align: center;">Page 78</p>	<p>1 a right to ask them questions in relation to just -- the</p> <p>2 documents which turn up, effectively, whether it's</p> <p>3 verifying that they're true copies or whatever.</p> <p>4 So that is a relevance which goes to all the</p> <p>5 witnesses who are the correct person to bring the</p> <p>6 documents. Now, Mr Humphrey, whether or not he is</p> <p>7 a person who can give relevant evidence in the sense of</p> <p>8 a letter of request for oral evidence, is the relevant</p> <p>9 person for the documents.</p> <p>10 So while it is correct that insofar as he is sought</p> <p>11 to be compelled to give witness evidence in relation to</p> <p>12 the underlying issues, that's the letter of request for</p> <p>13 oral evidence, we don't pursue that.</p> <p>14 We do say that it is right that he turn up to deal</p> <p>15 with any issues that arise on the documents. That is</p> <p>16 particularly the case where you have a situation with</p> <p>17 Begbies, where they are saying that they don't have to</p> <p>18 produce anything else.</p> <p>19 In relation to that, I shall just put down a marker.</p> <p>20 My learned friend says: well you know, we see the point</p> <p>21 on Project Raven so we are prepared to search for</p> <p>22 Project Blackbird as well, that being the name that was</p> <p>23 mentioned in the other document. That's not enough,</p> <p>24 obviously, just searching for the Project Raven and</p> <p>25 Project Blackbird does not necessarily answer the</p> <p style="text-align: center;">Page 80</p>

20 (Pages 77 to 80)

<p>1 requests which it has been agreed are relevant for</p> <p>2 documents which should be produced.</p> <p>3 MRS JUSTICE ANDREWS: Well they have to carry out a search</p> <p>4 in relation to documents that were generated, falling</p> <p>5 within the categories, that would have given rise to the</p> <p>6 reports.</p> <p>7 MS COCKERILL: Yes. They have to do the search --</p> <p>8 MRS JUSTICE ANDREWS: They will know what they called this</p> <p>9 project internally. You make the point that it may have</p> <p>10 been referred to as Project Raven in correspondence with</p> <p>11 Rio Tinto and it may have been called something else for</p> <p>12 internal purposes. Provided that they carry out</p> <p>13 a search in relation to the names which they know that</p> <p>14 they used for it, then that's going to be good enough,</p> <p>15 isn't it?</p> <p>16 MS COCKERILL: Well I think, my Lady, they ought to at least</p> <p>17 think about it, for this reason: your Ladyship is</p> <p>18 probably aware that in relation to these sorts of</p> <p>19 things, it's not necessarily the case that you get</p> <p>20 a project name straight away, so you might have a period</p> <p>21 of time where something is not called project anything,</p> <p>22 so you might have to look by reference to, you know, Rio</p> <p>23 Tinto Guinea.</p> <p>24 Likewise, your Ladyship will know that very often in</p> <p>25 the course of these kinds of investigations like in the</p> <p style="text-align: center;">Page 81</p>	<p>1 if you are dissatisfied with the disclosure and you want</p> <p>2 to ask him what steps he's taken or if the agreed steps</p> <p>3 haven't been taken, you want to interrogate him about</p> <p>4 that, I can't see how the court can stop him.</p> <p>5 But what I am not prepared to do, Ms Cockerill, is</p> <p>6 to allow a British Westinghouse-type enquiry in by the</p> <p>7 back door. You can't get it by the front door, you are</p> <p>8 certainly not going to get it by the back.</p> <p>9 MS COCKERILL: That is not the intention, my Lady. The</p> <p>10 maintenance of Mr Humphrey is very much with an eye to</p> <p>11 at the moment, BGTSA (?), we have three documents,</p> <p>12 that's it. If Mr Humphrey is going to send along those</p> <p>13 three documents and say that's the universe of what they</p> <p>14 can produce, then you know, I think we would be entitled</p> <p>15 to ask some questions about that.</p> <p>16 MRS JUSTICE ANDREWS: Well it's a shame, actually, that</p> <p>17 letters of request are so hidebound in terms of</p> <p>18 procedure that you have actually got to go through the</p> <p>19 motions of a live witness turning up, instead of</p> <p>20 somebody swearing an affidavit or a statement or putting</p> <p>21 a statement of truth on a disclosure list. Is there no</p> <p>22 way we can cut things down by doing that?</p> <p>23 What's going through my mind is that one -- of</p> <p>24 course accedes to the letter of request by providing</p> <p>25 that a proportionate search is carried out, disclosure</p> <p style="text-align: center;">Page 83</p>
<p>1 course of litigation, you may send an email which</p> <p>2 doesn't have the case name or the project name but</p> <p>3 simply the witness name or the document name.</p> <p>4 So a search which simply goes by reference to the</p> <p>5 project names is not necessarily going to be adequate.</p> <p>6 MRS JUSTICE ANDREWS: Can't the parties agree on keywords to</p> <p>7 put in a search in the ordinary way that you would in</p> <p>8 disclosure?</p> <p>9 MS COCKERILL: Well I see no reason why not, I am just</p> <p>10 putting down the marker that Project Blackbird isn't the</p> <p>11 be all and end all.</p> <p>12 MRS JUSTICE ANDREWS: I can see that it may be incumbent on</p> <p>13 Mr Humphrey to carry out more specific electronic</p> <p>14 search, or search and it seems to me the sensible way to</p> <p>15 deal with that is for the parties to agree the keywords</p> <p>16 and the matter to be proceeded with on the basis as if</p> <p>17 one was carrying out electronic disclosure here.</p> <p>18 Of course bearing in mind that that might then end</p> <p>19 up with thousands of hits every time you put in the word</p> <p>20 "Rio Tinto", which is problematic.</p> <p>21 MS COCKERILL: Yes.</p> <p>22 MRS JUSTICE ANDREWS: So you have to think of something</p> <p>23 sensible that's not going to unduly burden the party</p> <p>24 that has to carry out the search.</p> <p>25 As to Mr Humphrey being asked questions, of course</p> <p style="text-align: center;">Page 82</p>	<p>1 is carried out. You are not at the moment satisfied,</p> <p>2 I understand why. You get a keyword search, the witness</p> <p>3 who conducts it or causes it to be carried out then</p> <p>4 verifies the search by means of a properly attested</p> <p>5 statement or a list. Why does he then have to turn up</p> <p>6 and be cross-examined?</p> <p>7 MS COCKERILL: In many cases, I can see the force in that,</p> <p>8 my Lady. Sadly, one is hidebound by the process. Also</p> <p>9 in this case, I think one of the funny aspects of the</p> <p>10 BGT saga is your Ladyship may recall seeing in the</p> <p>11 skeleton arguments that one of the things BGT say is</p> <p>12 they have so little because RTZ told them to destroy</p> <p>13 documents and they did so.</p> <p>14 Now, Mr Humphrey being the person who is basically</p> <p>15 charged with the documents --</p> <p>16 MRS JUSTICE ANDREWS: Do you know under whose watch the</p> <p>17 destruction took place?</p> <p>18 MS COCKERILL: Well we are told in correspondence that this</p> <p>19 happened under the watch of somebody else. But I think</p> <p>20 the US court may want to have chapter and verse on that</p> <p>21 because it's obviously a very significant matter.</p> <p>22 Now it may be that Mr Humphrey can only say "The</p> <p>23 best that I can tell you is that this is what I've been</p> <p>24 told." But it is a matter which is obviously very</p> <p>25 serious and which I think we would say is best dealt</p> <p style="text-align: center;">Page 84</p>

21 (Pages 81 to 84)

<p>1 with, if necessary, by you know, Mr Humphrey answering</p> <p>2 a couple of questions.</p> <p>3 MRS JUSTICE ANDREWS: What is the ambit of the interrogation</p> <p>4 of Mr Humphrey that you want to pursue then? You want</p> <p>5 to ask him purely questions relating to what steps have</p> <p>6 been taken to carry out searches for the documents and</p> <p>7 why it is that he's unable to produce documents that no</p> <p>8 longer exist in the possession of the firm. Is that it?</p> <p>9 MS COCKERILL: Yes, and his best information as to what</p> <p>10 happened to those documents. It may be that that --</p> <p>11 MRS JUSTICE ANDREWS: Let's pause there and see what</p> <p>12 Mr George says about that.</p> <p>13 Submissions by MR GEORGE</p> <p>14 MR GEORGE: My Lady, there is absolutely nothing that</p> <p>15 Mr Humphrey will be able to add to paragraphs 9 and 10</p> <p>16 of his second witness statement. Has my Lady seen that?</p> <p>17 MRS JUSTICE ANDREWS: I probably have.</p> <p>18 MR GEORGE: May I just remind my Lady of it.</p> <p>19 MRS JUSTICE ANDREWS: Which of the many bundles am I now</p> <p>20 dealing with?</p> <p>21 MR GEORGE: Let me hand up the page.</p> <p>22 MRS JUSTICE ANDREWS: I have seen it. Read it out to me,</p> <p>23 Mr George, it's easier.</p> <p>24 MR GEORGE: It's coming up --</p> <p>25 MRS JUSTICE ANDREWS: I have it, I have it.</p> <p style="text-align: center;">Page 85</p>	<p>1 US court?</p> <p>2 MR GEORGE: My Lady, we would have no objection to -- those</p> <p>3 paragraphs, as it were, perhaps being -- maybe the whole</p> <p>4 witness statement is probably relevant. Certainly 9 and</p> <p>5 10 and indeed such a witness statement, leave aside the</p> <p>6 hidebound point, it would clearly be sensible if this</p> <p>7 was the type of witness statement that simply was to be</p> <p>8 produced once the further word searches have been</p> <p>9 carried out, explaining what the word searches are,</p> <p>10 attaching any new documents that have been found,</p> <p>11 reiterating paragraphs 9 and 10 but not -- and</p> <p>12 Mr Humphrey is, and I make this note very lightly, but</p> <p>13 he is the Group General Legal Counsel, a very</p> <p>14 significant and senior individual. To, as it were,</p> <p>15 require him to physically turn up and face questions</p> <p>16 about which he will be able to give no assistance to</p> <p>17 anyone is surprising for the courts --</p> <p>18 MRS JUSTICE ANDREWS: The only thing he is going to be able</p> <p>19 to give any assistance on is, it seems to me, the extent</p> <p>20 to which the searches were carried out.</p> <p>21 MR GEORGE: Which is subsequently in the future but assuming</p> <p>22 he puts in a witness statement saying what they are --</p> <p>23 there's obviously no reason to doubt they've been done,</p> <p>24 they'll have turned up what they turned up. If further</p> <p>25 word searches are wanted, as my Lady has said, it's</p> <p style="text-align: center;">Page 87</p>
<p>1 MR GEORGE: "Since my first statement ...(Reading to the</p> <p>2 words)... Mr Brown has confirmed to me ... to destroy</p> <p>3 all supporting and source documentation ... Mr Brown</p> <p>4 confirmed his recollection as he complied with</p> <p>5 ...(Reading to the words)... on the files. Such a</p> <p>6 standard practice would be to retain files ... for</p> <p>7 a period of six and a half years unless instructed</p> <p>8 otherwise. Our solicitors approached Mr Brown and</p> <p>9 Mr Leighton, requested they provide a witness statement</p> <p>10 in these proceedings, setting out their recollection of</p> <p>11 events, leading to the production of reports and the</p> <p>12 destruction of documents. Neither was willing to</p> <p>13 assist.</p> <p>14 We have suggested -- we don't know. It is clearly</p> <p>15 within the well resourced party of Vale's capability to</p> <p>16 go and find Mr Brown and Mr Leighton and obtain this</p> <p>17 information but there is nothing Mr Humphrey can provide</p> <p>18 beyond that. He has taken all such enquiries he was</p> <p>19 able to. It doubtless came as a surprise to him to find</p> <p>20 that the matters that occurred at paragraph 9 have</p> <p>21 occurred, but he has no basis on which to obtain any</p> <p>22 further information and that's all he could say if asked</p> <p>23 in cross-examination.</p> <p>24 MRS JUSTICE ANDREWS: What is the status of his witness</p> <p>25 statement? Can that be used, can that be put before the</p> <p style="text-align: center;">Page 86</p>	<p>1 clearly sensible to say in correspondence what they want</p> <p>2 rather than waiting until he turns up and asks him what</p> <p>3 they were. There is no value in the cross-examination.</p> <p>4 There is value in the production of a witness statement</p> <p>5 like this that stands, effectively, as a disclosure</p> <p>6 report would in modern litigation, explaining what has</p> <p>7 been done. There is nothing he can say about Mr Brown</p> <p>8 and Mr Leighton and as far as we know -- they clearly</p> <p>9 still exist because he has spoken to them and Vale</p> <p>10 can -- I am not encouraging them to do this, it's</p> <p>11 entirely a matter for them but if they want this</p> <p>12 information, it's to Mr Brown and Mr Leighton and not</p> <p>13 Mr Humphrey they should be looking and for those</p> <p>14 reasons, I invite my Lady not to order Mr Humphrey to</p> <p>15 attend, although obviously, we're happy to produce a</p> <p>16 report of this type and a statement of this type,</p> <p>17 confirming what's been done, in due course.</p> <p>18 Submissions by MS COCKERILL</p> <p>19 MS COCKERILL: My Lady, the position is that Mr Humphrey is</p> <p>20 the company secretary of Begbies trading group, he is</p> <p>21 the person within Begbies who is involved with dealing</p> <p>22 with formal governance and compliance levels, as well as</p> <p>23 the document management. It appears he was actually in</p> <p>24 that position at the time this documentation destruction</p> <p>25 was alleged to have taken place, so not only can he deal</p> <p style="text-align: center;">Page 88</p>

<p>1 with the question of how they have turned up the</p> <p>2 documents they have turned up now but he can deal with</p> <p>3 what his knowledge was in relation to the destruction of</p> <p>4 the documents and how such documents came to be</p> <p>5 destroyed, if they did come to be destroyed, without</p> <p>6 that coming to his attention, if he says that that is</p> <p>7 the case. It is a very serious matter, you will</p> <p>8 obviously appreciate, that documents are destroyed in</p> <p>9 relation to an issue which is potentially a serious</p> <p>10 matter before the US courts.</p> <p>11 We all know that the firms these days do have</p> <p>12 document maintenance policies and if that document</p> <p>13 maintenance policy is overwritten, that's something</p> <p>14 which probably ought to have come to his attention but</p> <p>15 certainly my clients do want to talk to him not just</p> <p>16 about what documents turn up but about this destruction</p> <p>17 of documents.</p> <p>18 The normal situation would be on a subpoena</p> <p>19 ducestecum, witness summons to produce documents, that</p> <p>20 a witness would turn up to deal with that sort of issue</p> <p>21 and there is no reason why that normal situation should</p> <p>22 be put into abeyance here.</p> <p>23 MRS JUSTICE ANDREWS: I will think about Mr Humphrey.</p> <p>24 MS COCKERILL: I am grateful, my Lady. While I am on the</p> <p>25 subject of Mr Humphrey, BGT and so forth, is it just</p> <p style="text-align: center;">Page 89</p>	<p>1 a High Court, and my submission is that in --</p> <p>2 MRS JUSTICE ANDREWS: The examiner has been appointed so one</p> <p>3 of us cannot sit. That is right, isn't it? I think</p> <p>4 a QC has already been appointed.</p> <p>5 MR GEORGE: Adrian Hughes, I believe, my Lady.</p> <p>6 MS COCKERILL: An examiner has been appointed but that could</p> <p>7 be amended as part of the order if your Ladyship saw</p> <p>8 fit. It's entirely a matter for your Ladyship which</p> <p>9 route you choose to go down but I would suggest that</p> <p>10 given the nature of the issues which might arise, it is</p> <p>11 a practical and sensible approach to deal with the</p> <p>12 possibility of hostile witness applications. Otherwise</p> <p>13 parties have to come back to court, it wastes time --</p> <p>14 MRS JUSTICE ANDREWS: The court has the power, does it, to</p> <p>15 confer upon an examiner the ability to rule whether</p> <p>16 a witness is hostile? Where does that come from?</p> <p>17 MS COCKERILL: Your Ladyship asks, naturally, a very good</p> <p>18 question. On the occasions when I think an examiner has</p> <p>19 been given that power, as far as I know it has been done</p> <p>20 with the consent of the parties. Otherwise, the people</p> <p>21 who have the power to rule are essentially masters and</p> <p>22 judges, and frequently one finds that examiners are not</p> <p>23 terribly keen on doing the ruling, which is why --</p> <p>24 MRS JUSTICE ANDREWS: It's a terrible burden on somebody.</p> <p>25 MS COCKERILL: If you have this sort of situation, the court</p> <p style="text-align: center;">Page 91</p>
<p>1 worth my picking up the final point in my skeleton about</p> <p>2 the form of the order?</p> <p>3 MR GEORGE: My Lady, I apologise, I did have something to</p> <p>4 say on the hostile witness point but my learned friend</p> <p>5 may well be addressing the same authorities because my</p> <p>6 knowledge came from her book.</p> <p>7 MRS JUSTICE ANDREWS: Yes, the form of the order.</p> <p>8 MS COCKERILL: What I have suggested, my Lady, is to the</p> <p>9 extent that there is a history, and I will be coming</p> <p>10 back to this, of getting these documents being</p> <p>11 troublesome and also in this case, BGT saying documents</p> <p>12 have been destroyed and so forth, there is a possibility</p> <p>13 that questions of a hostile nature may be needed to be</p> <p>14 asked to these witnesses.</p> <p>15 Now your Ladyship will appreciate that treating</p> <p>16 a witness as hostile in an examination is not entirely</p> <p>17 a straightforward matter because the examiner has no</p> <p>18 power to rule on that in the usual way.</p> <p>19 So where it is a case where a possibility of</p> <p>20 a ruling as a hostile witness floats onto the horizon,</p> <p>21 it is possible, and Senior Master Whitaker sometimes</p> <p>22 used to make an order either for a master or a judge to</p> <p>23 sit as the examiner, so that they could then rule or to</p> <p>24 put in something into the order to say the examiner</p> <p>25 should have power to rule as if they were a master of</p> <p style="text-align: center;">Page 90</p>	<p>1 tends to prefer to give it to a master or judge.</p> <p>2 MRS JUSTICE ANDREWS: It's looking like it's going to have</p> <p>3 to be a master, isn't it, but I will see what Mr George</p> <p>4 has to say.</p> <p>5 MR GEORGE: Again, I can take instructions over the short</p> <p>6 adjournment about how much we wish to press this point</p> <p>7 but certainly in our submission there is no evidence</p> <p>8 before this court which could justify that this should</p> <p>9 be the first occasion in however many hundreds of years</p> <p>10 it is, as the review in the relevant section of my</p> <p>11 learned friend's book, should justify this court on this</p> <p>12 occasion to assume, if it has the power at all, to</p> <p>13 exercise it, to give the power to treat a witness as</p> <p>14 hostile.</p> <p>15 MRS JUSTICE ANDREWS: On the other hand this is one of these</p> <p>16 cases where I have this horrible view that at some point</p> <p>17 in the course of the examination, somebody might say the</p> <p>18 witness, rightly or wrongly, is behaving as a hostile</p> <p>19 witness and want to have the opportunity -- of course it</p> <p>20 will be their own witness, would it not, because</p> <p>21 a hostile witness is where you call the witness --</p> <p>22 MR GEORGE: And you are bound.</p> <p>23 MRS JUSTICE ANDREWS: I am just wondering how it arises in</p> <p>24 this context because the witness is being called to be</p> <p>25 examined but they're normally being cross-examined,</p> <p style="text-align: center;">Page 92</p>



<p>1 aren't they? But wouldn't they be cross-examined by</p> <p>2 Vale or is Vale going to be actually asking them</p> <p>3 non-leading questions?</p> <p>4 MR GEORGE: Apparently examination-in-chief is required.</p> <p>5 MRS JUSTICE ANDREWS: So the question is whether or not they</p> <p>6 would be able to cross-examine them. It seems to me</p> <p>7 it's obviously sensible that whoever conducts this</p> <p>8 examination to have the power to rule on such an</p> <p>9 application, if it occurs, because if they don't,</p> <p>10 everybody is going to be back in court, the judge or the</p> <p>11 master is then going to have to make a ruling when he</p> <p>12 hasn't actually seen the witness, which is nonsense</p> <p>13 because the only person who can really evaluate what</p> <p>14 someone's behaviour is like is the person who's actually</p> <p>15 conducting the examination. So I think the answer to</p> <p>16 this is to modify the order to direct the examination be</p> <p>17 carried out before a master.</p> <p>18 MR GEORGE: My Lady, let me take instructions over the short</p> <p>19 adjournment as to whether we need to press you on that</p> <p>20 or whether we are willing to consent to the powers to be</p> <p>21 conferred on Mr Hughes, and I'll take instructions.</p> <p>22 MRS JUSTICE ANDREWS: It's one or the other, I think.</p> <p>23 MS COCKERILL: If your Ladyship is minded to go down that</p> <p>24 route, I do have a form of order that has been used in</p> <p>25 the fairly recent past.</p> <p style="text-align: center;">Page 93</p>	<p>1 whether something was an orange flag or a red flag and</p> <p>2 so it's really a question of what they had the right to</p> <p>3 ask, and if they didn't follow up certain red flags,</p> <p>4 orange flags, yellow flags, whatever, does that tip</p> <p>5 into, as a matter of New York law, a lack of due</p> <p>6 diligence for the purposes of equitable tolling.</p> <p>7 It also links up with a point we have made in</p> <p>8 Mr Kelly's witness statement. Of course if these firms</p> <p>9 are providing litigation support, you expect this sort</p> <p>10 of material, either to be available or to be made</p> <p>11 available.</p> <p>12 So that's --</p> <p>13 MRS JUSTICE ANDREWS: It's what they could have found out if</p> <p>14 they'd asked questions at the relevant time but with the</p> <p>15 underlining at the relevant time because Mr George, it</p> <p>16 seems to me, has a fair point about the dates of all of</p> <p>17 these reports.</p> <p>18 MS COCKERILL: That's the other point I want to deal with.</p> <p>19 I will finish off this and deal with that.</p> <p>20 MRS JUSTICE ANDREWS: You say it's not just knowledge, but</p> <p>21 it's what they might have asked and might have found out</p> <p>22 if they hadn't?</p> <p>23 MS COCKERILL: Yes, and of course, they get something in a</p> <p>24 report and they don't particularly like the look of it</p> <p>25 and so they don't follow it up, whereas you know, it's</p> <p style="text-align: center;">Page 95</p>
<p>1 MRS JUSTICE ANDREWS: Alright, Ms Cockerill, my view is it</p> <p>2 is preferable that the power should exist. If there's</p> <p>3 any doubt as to whether or not the examiner will have</p> <p>4 that power, it's going before a master.</p> <p>5 MS COCKERILL: I am grateful, my Lady.</p> <p>6 MRS JUSTICE ANDREWS: That brings us back to the</p> <p>7 confidentiality, does it not?</p> <p>8 MS COCKERILL: It does, it does indeed. Now, I think that</p> <p>9 there are a couple of points which I should probably</p> <p>10 deal with first before I go back to the beginning of my</p> <p>11 submissions, as they are --</p> <p>12 MRS JUSTICE ANDREWS: Why don't you deal with those before</p> <p>13 lunch.</p> <p>14 MS COCKERILL: Then I can see how --</p> <p>15 MRS JUSTICE ANDREWS: Reformulate the way in which you want</p> <p>16 to put it, in the light of the discussions this morning.</p> <p>17 MS COCKERILL: Yes. The two points that I really wanted to</p> <p>18 deal with, with you before lunch, were firstly this</p> <p>19 question of the relevance of Rio Tinto's knowledge and</p> <p>20 I think when we started this morning, your Ladyship was</p> <p>21 saying surely what matters is what Rio Tinto knew.</p> <p>22 MRS JUSTICE ANDREWS: I think I will modify that, knew or</p> <p>23 could have found out at the time.</p> <p>24 MS COCKERILL: Yes. Your Ladyship talked about red or</p> <p>25 orange flags and of course one of the issues will be</p> <p style="text-align: center;">Page 94</p>	<p>1 something which is important.</p> <p>2 There's one other point which is highly significant</p> <p>3 in this regard, and I think also tips over into the</p> <p>4 timing point. I am instructed that, as a matter of</p> <p>5 New York law, it's not simply RTZ's knowledge -- sorry,</p> <p>6 I mustn't say RTZ -- RT's knowledge that matters, for</p> <p>7 the purposes of equitable tolling. The firm's</p> <p>8 knowledge, the investigative firm's knowledge is imputed</p> <p>9 to RT for the purposes of that argument.</p> <p>10 MRS JUSTICE ANDREWS: On a sort of imputed agency basis</p> <p>11 MS COCKERILL: I believe so. So that's the first point</p> <p>12 I wanted to deal with.</p> <p>13 The second point was this time period argument which</p> <p>14 I entirely understand your Ladyship's initial reaction,</p> <p>15 it does look a bit odd.</p> <p>16 But of course your Ladyship has to bear in mind that</p> <p>17 when you look at the reports, the actual reports that</p> <p>18 have been disclosed go over the whole period, so you</p> <p>19 have there to start off with a powerful indication that</p> <p>20 so far as the New York court is concerned, the entire</p> <p>21 period matters. The reason why it matters, I am going</p> <p>22 to try and explain.</p> <p>23 We do not accept, and I am firmly instructed by</p> <p>24 those who are sitting behind me in New York, that as</p> <p>25 a matter of New York law, post 2010 reports are</p> <p style="text-align: center;">Page 96</p>

<p>1 relevant. They are relevant, for example, to the</p> <p>2 question of whether the investigation was frustrated by</p> <p>3 fraudulent concealment. So if the investigators were</p> <p>4 able to get information after April 2010 and before the</p> <p>5 announcement of --</p> <p>6 MRS JUSTICE ANDREWS: Slow down, slow down. Whether the</p> <p>7 investigation was frustrated by fraudulent concealment?</p> <p>8 MS COCKERILL: Yes.</p> <p>9 MRS JUSTICE ANDREWS: Which is, of course, Rio Tinto's</p> <p>10 point.</p> <p>11 MS COCKERILL: Yes.</p> <p>12 MRS JUSTICE ANDREWS: Yes.</p> <p>13 MS COCKERILL: So if they were able to get information sort</p> <p>14 of in the early phase after April 2010, then it would --</p> <p>15 not the late phase after 2010, the early phase -- then</p> <p>16 it would appear they weren't frustrated by fraudulent</p> <p>17 concealment.</p> <p>18 Secondly, if they discovered certain things</p> <p>19 after April 2010, then an inference may arise that the</p> <p>20 investigator could have obtained that particular</p> <p>21 information prior to April 2010.</p> <p>22 They only didn't because RT or its agents didn't ask</p> <p>23 them to look for it.</p> <p>24 Thirdly, information which was actually reported</p> <p>25 after April 2010 may have been discovered before.</p> <p style="text-align: center;">Page 97</p>	<p>1 introduced --</p> <p>2 MRS JUSTICE ANDREWS: It sound like a bad point anyway.</p> <p>3 MR GEORGE: I am glad.</p> <p>4 MS COCKERILL: In my defence, I would say this. The point</p> <p>5 about the timing of the reports is one which certainly</p> <p>6 first came to my attention in my learned friend's</p> <p>7 skeleton yesterday afternoon but your Ladyship should</p> <p>8 understand that we do not accept that this timing point</p> <p>9 is a good one --</p> <p>10 MRS JUSTICE ANDREWS: The thing about the timing point i</p> <p>11 seems to me, as I said to Mr George, is that there is an</p> <p>12 element of water under the bridge about it. The</p> <p>13 New York court has issued letters of request, rightly or</p> <p>14 wrongly, that relate to the reports which you have, and</p> <p>15 those include reports which postdate April 2010.</p> <p>16 I can't rewrite the letters of request. I have</p> <p>17 a discretion in relation to categories, as to whether</p> <p>18 they are to be disallowed for reasons of lack of</p> <p>19 specificity or for reasons of public policy or something</p> <p>20 along that nature and I won't allow a Westinghouse-type</p> <p>21 fishing expedition.</p> <p>22 But apart from that, it doesn't seem to me that it's</p> <p>23 now possible for me to rewrite history and say you</p> <p>24 cannot have the documents which the New York court has</p> <p>25 requested because they relate to events after</p> <p style="text-align: center;">Page 99</p>
<p>1 Fourthly, there is apparently law in New York that</p> <p>2 Rio Tinto can't invoke the statute of limitations if</p> <p>3 they didn't bring their claim as soon as possible after</p> <p>4 they knew of the claim, even if they had been able to</p> <p>5 suspend the limitation period earlier. So discovery --</p> <p>6 MRS JUSTICE ANDREWS: Similar to section 32.</p> <p>7 MS COCKERILL: It is.</p> <p>8 MRS JUSTICE ANDREWS: So the equitable tolling runs out at</p> <p>9 the point at which you could reasonably have brought the</p> <p>10 claim, notwithstanding any concealment at an earlier</p> <p>11 stage. So the date when they actually found out that</p> <p>12 they had enough is pertinent and the date when they</p> <p>13 actually found out, might well be after 2010. But that</p> <p>14 would still bring them within the limitation period,</p> <p>15 surely?</p> <p>16 MS COCKERILL: Well I am told that it affects their ability</p> <p>17 to rely on the statute of limitations if they didn't act</p> <p>18 as quickly as possible after they discovered. So if you</p> <p>19 then -- yes.</p> <p>20 MRS JUSTICE ANDREWS: I don't follow that at all.</p> <p>21 MR GEORGE: My Lady, I hesitate to interrupt. There's reams</p> <p>22 of evidence before this court and this is the first</p> <p>23 time, as I understand it, that this point has been</p> <p>24 taken. We have had no opportunity to consider its</p> <p>25 voracity or validity and it should not be allowed to be</p> <p style="text-align: center;">Page 98</p>	<p>1 2 April 2010.</p> <p>2 So whether it's strictly relevant or not, I am not</p> <p>3 sure really adds very much to the general thrust of it.</p> <p>4 It's been done.</p> <p>5 MS COCKERILL: Well I obviously agree with your Ladyship but</p> <p>6 for the reasons that I have given, the reasons why the</p> <p>7 later reports are in evidence in the States and the</p> <p>8 letter of request was phrased around them and requests</p> <p>9 were made in relation to the later report, is as</p> <p>10 a matter of New York law relevance and that's why the</p> <p>11 New York judge asked.</p> <p>12 MRS JUSTICE ANDREWS: I can see the point about getting</p> <p>13 information in the early days and whether that goes to</p> <p>14 the question of frustration. As to whether or not one</p> <p>15 can draw inferences as to whether or not the information</p> <p>16 could have been obtained earlier, that seems to me to be</p> <p>17 an entirely circular argument because one is simply</p> <p>18 speculating as to what they would have got if they'd</p> <p>19 been asked.</p> <p>20 The first thing you have to do is find out whether</p> <p>21 the question has been asked. If the question wasn't</p> <p>22 asked, then you have to look at what information was</p> <p>23 available at the time and not what they get at a later</p> <p>24 stage.</p> <p>25 But anyway, it's an interesting point, Ms Cockerill,</p> <p style="text-align: center;">Page 100</p>

<p>1 but I think that as far as this application is</p> <p>2 concerned, I am not going to start truncating the</p> <p>3 timescale because the letter of request already says it</p> <p>4 covers the whole period. Rightly or wrongly.</p> <p>5 MS COCKERILL: I am grateful for that indication, my Lady.</p> <p>6 So those were the two points I wanted to address before</p> <p>7 you before lunch.</p> <p>8 MRS JUSTICE ANDREWS: I think we will break there then if</p> <p>9 that's a convenient moment and resume at 2. I was going</p> <p>10 to ask both of you, what do you want from me in terms of</p> <p>11 a ruling? Do you want something formal handed down or</p> <p>12 do you want me just to tell you what I think the answer</p> <p>13 should be at the close of submissions and then go away</p> <p>14 and write up the order?</p> <p>15 MR GEORGE: May I take instructions from my three clients</p> <p>16 over the short adjournment?</p> <p>17 MRS JUSTICE ANDREWS: Tell me at 2 o'clock.</p> <p>18 (12.54 pm)</p> <p>19 (The short adjournment)</p> <p>20 (2.00 pm)</p> <p>21 MRS JUSTICE ANDREWS: Ms Cockerill, I have an apology to</p> <p>22 make to the shorthand writers. I didn't realise there</p> <p>23 was only one person and I would normally have had</p> <p>24 a break. At an appropriate moment, if we are still</p> <p>25 going, I will have a break for her. I'm really sorry.</p> <p style="text-align: center;">Page 101</p>	<p>1 is to have the actual disclosure of the identity, we</p> <p>2 would ask for obvious reasons, for --</p> <p>3 MRS JUSTICE ANDREWS: Alright, well I see where both parties</p> <p>4 are, thank you.</p> <p>5 MS COCKERILL: It may be, my Lady, that we could rough out</p> <p>6 an order today, with your Ladyship handing down a formal</p> <p>7 judgment at a later stage, if that were the way to</p> <p>8 approach it.</p> <p>9 MRS JUSTICE ANDREWS: If I were to go down the course that</p> <p>10 Mr George would want a reserved judgment on, that's the</p> <p>11 only way that we would be able to deal with it, I think.</p> <p>12 MS COCKERILL: I am grateful. Unless your Ladyship has</p> <p>13 anything further to deal with before I get to the bulk</p> <p>14 of my submissions, I will start.</p> <p>15 I hope you will excuse me if I start with a couple</p> <p>16 of introductory points which I will take as speedily as</p> <p>17 I may, but I think they are important for you to</p> <p>18 understand where my client is on this.</p> <p>19 The first point is that the starting point is</p> <p>20 everybody agrees underlying material which was used to</p> <p>21 put these reports together is relevant evidence for</p> <p>22 trial. Nobody has denied this.</p> <p>23 The primary response, of course, which one expects</p> <p>24 from a letter of request of this nature is the whole lot</p> <p>25 is fishing, it's not evidence for trial. That's exactly</p> <p style="text-align: center;">Page 103</p>
<p>1 MS COCKERILL: Thank you, my Lady. Just before we broke for</p> <p>2 the short adjournment, you asked the parties to consider</p> <p>3 how we would like to proceed in terms of judgment, order</p> <p>4 or whatever.</p> <p>5 For our part, we would be keen to pursue the course</p> <p>6 that results in the speediest determination to an order.</p> <p>7 So if that is by way of relatively informal judgment and</p> <p>8 your sketching out with us this afternoon exactly where</p> <p>9 the order goes, we would, for our part, be content with</p> <p>10 that. I don't know if my learned friend has anything to</p> <p>11 say.</p> <p>12 MRS JUSTICE ANDREWS: Mr George?</p> <p>13 MR GEORGE: My Lady, for our part, and you will appreciate</p> <p>14 the submissions I've made on the importance to the</p> <p>15 industry and the clients. If my Lady were minded to</p> <p>16 order at this time, disclosure of the identity of</p> <p>17 sources, we would ask for a formal judgment so that</p> <p>18 could be considered by my clients.</p> <p>19 To the extent that my Lady is minded to -- there are</p> <p>20 a range of options that have been set out between the</p> <p>21 parties but require some other form of relief at this</p> <p>22 stage. For example, ordering us to provide descriptions</p> <p>23 that don't reveal the identity as has been mooted. We</p> <p>24 would be more than content for my Lady to indicate that</p> <p>25 today so that we can move on and implement it but if it</p> <p style="text-align: center;">Page 102</p>	<p>1 what we don't see here.</p> <p>2 We don't see Rio Tinto, as one so often does, here,</p> <p>3 taking every point under the sun. So nobody disputes</p> <p>4 this material will assist the New York court at trial</p> <p>5 and the New York court has, of course, sought this help</p> <p>6 to determine extremely serious allegations.</p> <p>7 So that's your starting point. We say that this is</p> <p>8 therefore material that should be provided in toto</p> <p>9 unless there are very good reasons why not.</p> <p>10 Two other background points. The first concerns the</p> <p>11 reason why we are here. That is essentially the</p> <p>12 behaviour of RT in the US and this is a point which goes</p> <p>13 to the material generally but does also relate to the</p> <p>14 question of sources which we of course are focusing on.</p> <p>15 Your Ladyship I think has read Mr Kelly's second</p> <p>16 witness statement so I won't take you to it in extenso</p> <p>17 but you will have seen from that, that RT has really</p> <p>18 done its best to frustrate the production of documents</p> <p>19 in the US. This material was requested there, RT took</p> <p>20 a rather dubious point about: well can you oblige us to</p> <p>21 produce material which isn't actually physically in our</p> <p>22 possession.</p> <p>23 They were then told to contact the firms and did so</p> <p>24 in advance of the firms uniformly rejecting the</p> <p>25 requests, citing confidentiality of sources. They were</p> <p style="text-align: center;">Page 104</p>

<p>1 told then to contact the firms specifically in relation</p> <p>2 to sources, and this is something which it might be</p> <p>3 worth just taking your Ladyship to because we are</p> <p>4 talking about sources.</p> <p>5 I have shown your Ladyship the letter of request and</p> <p>6 the extent to which that deals with sources. If</p> <p>7 your Ladyship were to turn up the Livingstone bundle,</p> <p>8 which I think is also the blue bundle, number 2, and go</p> <p>9 to the exhibit to Mr Kelly's statement, and go to</p> <p>10 page 97 of the exhibit.</p> <p>11 You will see there an extract from the transcript of</p> <p>12 one of the hearings in New York. You see towards the</p> <p>13 bottom of the page there, which is page 25 of the</p> <p>14 transcript, the court --</p> <p>15 MRS JUSTICE ANDREWS: Page, sorry?</p> <p>16 MS COCKERILL: Page 97 of the exhibit, page 25 of the</p> <p>17 transcript.</p> <p>18 MRS JUSTICE ANDREWS: Tab 2 gives me Mr Kelly's witness</p> <p>19 statement --</p> <p>20 MS COCKERILL: Sorry, my Lady, we're in Livingstone</p> <p>21 bundle --</p> <p>22 MRS JUSTICE ANDREWS: I only have one Livingstone bundle,</p> <p>23 that's the blue bundle, yes. So where do I find the tab</p> <p>24 that you want me to look at?</p> <p>25 MS COCKERILL: Sorry, if your Ladyship could turn up</p> <p style="text-align: center;">Page 105</p>	<p>1 "You, or at least your client, has had</p> <p>2 a relationship with the ... investigators that allows</p> <p>3 you to ask for this information because it was being</p> <p>4 asked for in a lawsuit and you are to do that without</p> <p>5 any negative in there, whether that's a wink or</p> <p>6 whatever. I want a very clean letter sent out by</p> <p>7 appropriate relationship person, saying you are acting</p> <p>8 at the request of Rio Tinto, asking them to disclose the</p> <p>9 confidential sources."</p> <p>10 So your Ladyship sees there that the New York court</p> <p>11 was quite forceful about wanting those sources and the</p> <p>12 answer which came back from Rio Tinto was: well, no, we</p> <p>13 can't get it, which of course is an answer which appears</p> <p>14 to contradict the terms of the contract which</p> <p>15 your Ladyship was discussing with my learned friend</p> <p>16 earlier.</p> <p>17 MRS JUSTICE ANDREWS: It's directly contrary to clause 16</p> <p>18 MS COCKERILL: Exactly. So your Ladyship therefore sees</p> <p>19 a very, it would appear, clear determination on the part</p> <p>20 of RTZ to --</p> <p>21 MRS JUSTICE ANDREWS: Mind you, I say it's a clear</p> <p>22 distinction. I am not sure actually. They would be</p> <p>23 entitled to ask questions in the provision of</p> <p>24 information, the extent to which it actually entitles</p> <p>25 them to the names of the confidential sources -- maybe</p> <p style="text-align: center;">Page 107</p>
<p>1 Mr Kelly's second statement wherever you have it, I have</p> <p>2 it at tab 9 in the second Livingstone bundle.</p> <p>3 MRS JUSTICE ANDREWS: There isn't a second Livingstone</p> <p>4 bundle. I do have an exhibit separately in a Cleary</p> <p>5 Gottlieb bundle and it's the second witness statement,</p> <p>6 page 97 did you say?</p> <p>7 MS COCKERILL: Page 97. So at line 17:</p> <p>8 "The court: all right, I am going to direct you for</p> <p>9 each of these investigators to say that you are</p> <p>10 directing, ordering, requesting, whatever word you think</p> <p>11 is most important under the contract, for them to reveal</p> <p>12 the names of their sources to you and that you want</p> <p>13 a written response and we will see where it goes from</p> <p>14 there."</p> <p>15 Then Rio Tinto says:</p> <p>16 "We don't think --"</p> <p>17 MRS JUSTICE ANDREWS: Who is Mr Lyttle? Who does he</p> <p>18 represent?</p> <p>19 MS COCKERILL: I think that's Rio Tinto. He says:</p> <p>20 "I do not think we have a right under the contract</p> <p>21 to source names. We have asked them if they are willing</p> <p>22 to provide it."</p> <p>23 The court goes on to say:</p> <p>24 "Well I have no control over the non-parties."</p> <p>25 And goes on to say that:</p> <p style="text-align: center;">Page 106</p>	<p>1 I am going a little far in saying that. It's certainly</p> <p>2 arguable.</p> <p>3 MS COCKERILL: Well it's certainly a broad provision which</p> <p>4 appears --</p> <p>5 MRS JUSTICE ANDREWS: But this is on the basis of whatever</p> <p>6 is within their possession, power, custody and control</p> <p>7 that's being directed, as part of their personal</p> <p>8 obligation of disclosure, isn't it?</p> <p>9 MS COCKERILL: Yes. The point that I'm really making here</p> <p>10 is that you can see that RT have not been doing their</p> <p>11 best to assist with the process. You have heard what's</p> <p>12 happened in relation to the BTG documents that RT have</p> <p>13 apparently ordered --</p> <p>14 MRS JUSTICE ANDREWS: Yes, Rio Tinto have been extremely</p> <p>15 naughty.</p> <p>16 MS COCKERILL: And the simple point I am making is the court</p> <p>17 should really be alert to being made a party to this</p> <p>18 sort of reprehensible behaviour by going along with the</p> <p>19 arguments which avoid the material being made</p> <p>20 available --</p> <p>21 MRS JUSTICE ANDREWS: That gets rid of the jury point, let's</p> <p>22 get on to the substance. I understand you have a duty</p> <p>23 to your clients, Ms Cockerill, but there is only one of</p> <p>24 me here, not 12.</p> <p>25 MS COCKERILL: Your Ladyship puts it very amusingly. If</p> <p style="text-align: center;">Page 108</p>

<p>1 I can just say one more thing, and I will do this really</p> <p>2 quickly, I promise you. The investigative firms of</p> <p>3 course deny that they have any coordination with Rio</p> <p>4 Tinto in the steps they are taking and you have seen</p> <p>5 that in the new statement served by Farrers. But</p> <p>6 your Ladyship has seen, I think, what we have had to say</p> <p>7 in Mr Kelly's witness statement, that if there isn't</p> <p>8 coordination between at least the parties, the</p> <p>9 investigative firm, something very surprising is going</p> <p>10 on.</p> <p>11 If I could just ask you for your note, at page 103</p> <p>12 and 105 of Mr Kelly's exhibit, if your Ladyship were to</p> <p>13 turn that up at some point and you could see just to</p> <p>14 what extent there is overlap between the way that the</p> <p>15 firms have presented their case. And there, I will</p> <p>16 leave my jury point with one very small coda, which is</p> <p>17 that there is a contrast. We have, by contrast, sought</p> <p>18 to take a very realistic and constructive approach to</p> <p>19 this application and your Ladyship will have noted that</p> <p>20 in relation to some requests which could have been</p> <p>21 highly contentious, we have stepped back from them,</p> <p>22 wanting to make sure that there's not a waste of time</p> <p>23 and costs -- and that we are now focusing --</p> <p>24 MRS JUSTICE ANDREWS: You are to be commended for that but</p> <p>25 you still eschew, or your clients eschew, the sensible</p> <p style="text-align: center;">Page 109</p>	<p>1 MS COCKERILL: Well, I have taken your Ladyship to the</p> <p>2 paragraphs earlier, I am not going to do that again.</p> <p>3 What I will just say is this. If your Ladyship looks</p> <p>4 back at where we got to on fraudulent concealment this</p> <p>5 morning and the degree of complexity which there is in</p> <p>6 there and the question of attribution of the knowledge</p> <p>7 or imputation of the knowledge of the firms. When</p> <p>8 your Ladyship looks at that, and you're looking at the</p> <p>9 question of red flags, surely it makes a difference to</p> <p>10 whether a flag is red or orange or yellow or green,</p> <p>11 potentially who the source is.</p> <p>12 MRS JUSTICE ANDREWS: No. Where the source comes from, yes.</p> <p>13 Identity of the individual, no. "Somebody close to the</p> <p>14 president's palace has told us X", yes, that's</p> <p>15 potentially very powerful information. The fact that it</p> <p>16 was the under minister for the interior as opposed to</p> <p>17 the minister for justice, neither matters nor takes you</p> <p>18 a step further at all.</p> <p>19 MS COCKERILL: But my Lady, as one knows from the trashy</p> <p>20 newspapers or magazines over here, the phrase "someone</p> <p>21 close to" can cover somebody who actually has good</p> <p>22 sources of knowledge or the tea boy. You know, there is</p> <p>23 a real difference between the areas of information which</p> <p>24 you can cover under that sort of description. That is</p> <p>25 one of the problems with the descriptions which have</p> <p style="text-align: center;">Page 111</p>
<p>1 course of allowing generic descriptions and insist on</p> <p>2 pursuing the names of individuals whose lives may be put</p> <p>3 at danger, on the evidence before me.</p> <p>4 MS COCKERILL: I shall have to address you on whether the</p> <p>5 evidence really goes that far and I shall move on to</p> <p>6 that now.</p> <p>7 But I am just sort of saying to your Ladyship that</p> <p>8 the reason that we are pursuing this, in the light of</p> <p>9 points which are being run very hard in the other</p> <p>10 direction, is that we have considered this carefully and</p> <p>11 what is left are matters of great importance to us, to</p> <p>12 the New York litigation.</p> <p>13 MRS JUSTICE ANDREWS: But why? I mean this is the one thing</p> <p>14 I'm finding incredibly difficult to drill down to.</p> <p>15 I can understand why you want to be able to evaluate</p> <p>16 what Rio Tinto knew. I can understand why you want to</p> <p>17 be able to evaluate what Rio Tinto could have got out of</p> <p>18 the business firms that they instructed and that their</p> <p>19 knowledge is to be attributed to Rio Tinto and so on.</p> <p>20 All of that will have a bearing on whether or not the</p> <p>21 action is time barred or there's this equitable tolling</p> <p>22 defence available.</p> <p>23 I can't see how knowing that it was John Smith or</p> <p>24 Fred Bloggs who provided the information is going to get</p> <p>25 you an iota further in that objective.</p> <p style="text-align: center;">Page 110</p>	<p>1 been put forward. Unless you have the source and you</p> <p>2 know who they are, you are still groping in the dark, in</p> <p>3 my submission.</p> <p>4 We will obviously come back to that.</p> <p>5 On confidentiality, there's a fundamental difference</p> <p>6 between the sides. My learned friend's side proceeds as</p> <p>7 if the burden is somehow on me to show you why these</p> <p>8 materials should be disclosed in full.</p> <p>9 MRS JUSTICE ANDREWS: No, the burden is on him to explain</p> <p>10 why the order should be redacted because, on the face of</p> <p>11 it, you have an order which gives full and unredacted</p> <p>12 effect to the letters of request which is what this</p> <p>13 court would normally do as a matter of comity. But he</p> <p>14 says he has at least shifted the evidential burden the</p> <p>15 other way, by two sources. One, he says the material is</p> <p>16 not actually relevant to anything you need and you are</p> <p>17 going to have to persuade me that it is. And, secondly,</p> <p>18 he says that I have to weigh into the balance the public</p> <p>19 policy aspects of this and the fact that one would be</p> <p>20 trespassing upon information that is confidential and</p> <p>21 one doesn't do that lightly.</p> <p>22 MS COCKERILL: But the way my learned friend approaches it</p> <p>23 is that, basically, as soon as he waves the</p> <p>24 confidentiality card, somehow the burden shifts to me</p> <p>25 and that is not the case.</p> <p style="text-align: center;">Page 112</p>



<p>1 Because I am sure your Ladyship remembers,</p> <p>2 essentially, what the Nasse case says. It's only in</p> <p>3 exceptional circumstances, really, that confidentiality</p> <p>4 shifts, even in the disclosure context, to a point where</p> <p>5 you say you don't get the documents or you don't get the</p> <p>6 information.</p> <p>7 MRS JUSTICE ANDREWS: The court will not usually refuse to</p> <p>8 order the disclosure of relevant, and I stress relevant,</p> <p>9 documents or information to a party, merely because it</p> <p>10 is said to be confidential. Even if the confidentiality</p> <p>11 arises in the context of an express contractual promise</p> <p>12 of confidentiality. That is absolutely trite.</p> <p>13 So the starting point is in favour of disclosure of</p> <p>14 the information, unless it is irrelevant or there are</p> <p>15 countervailing reasons why it should not -- good</p> <p>16 countervailing reasons why it shouldn't be disclosed.</p> <p>17 MS COCKERILL: Absolutely, my Lady.</p> <p>18 MRS JUSTICE ANDREWS: You would agree with that as</p> <p>19 a formulation of the law?</p> <p>20 MS COCKERILL: I would put it slightly differently. That's</p> <p>21 in the disclosure context. Your Ladyship has to, of</p> <p>22 course, remember that here we're in the subpoena context</p> <p>23 so we are looking not merely at material which has been</p> <p>24 said to be relevant in the disclosure sense but evidence</p> <p>25 which is relevant for trial, trial evidence. That's</p> <p style="text-align: center;">Page 113</p>	<p>1 confidentiality -- you really, really, really need to</p> <p>2 know the identity of source A because the information</p> <p>3 that source A has provided is of critical import,</p> <p>4 whereas the information that source B has provided</p> <p>5 doesn't actually take the case one way or the other.</p> <p>6 MS COCKERILL: It is a potential way forward. It's not</p> <p>7 a good way forward, for two reasons essentially.</p> <p>8 Firstly, it effectively puts a chink in the door of the</p> <p>9 primacy of the needs of litigation. It effectively cuts</p> <p>10 away from the Nasse principle. Because you're then</p> <p>11 saying well, you know, we'll basically let the</p> <p>12 confidentiality argument have its head and put the</p> <p>13 burden of proof on the party who otherwise has a right</p> <p>14 to the documents, to prove that they should have the</p> <p>15 full information. We say where a case has been made out</p> <p>16 for the relevance of that information, that is not</p> <p>17 satisfactory.</p> <p>18 The second thing is a boring practical point, I'm</p> <p>19 afraid, my Lady. There is not a huge amount of time in</p> <p>20 play here.</p> <p>21 MRS JUSTICE ANDREWS: Then you just have to run the risk</p> <p>22 Ms Cockerill, that whatever I rule today, if it's</p> <p>23 against you, shuts the door.</p> <p>24 MS COCKERILL: Well that is --</p> <p>25 MRS JUSTICE ANDREWS: If that's the risk that your clients</p> <p style="text-align: center;">Page 115</p>
<p>1 a higher hurdle which we have already met.</p> <p>2 So your Ladyship should be particularly cautious.</p> <p>3 Of course, cases like Pharaon (?), and there are</p> <p>4 a number of other cases, even show you that in some</p> <p>5 cases of bankers' confidentiality, the court will say,</p> <p>6 you know, that's a really well established, highly</p> <p>7 important, totally recognised area of confidentiality.</p> <p>8 Confidentiality loses when documents are necessary for</p> <p>9 the purposes of litigation.</p> <p>10 MRS JUSTICE ANDREWS: And the keyword is "necessary".</p> <p>11 MS COCKERILL: Yes. My Lady, I have made my submissions on</p> <p>12 that. We can come back to it and debate it some more at</p> <p>13 a later point. I have explained to your Ladyship,</p> <p>14 I hope, that we do not accept that cutting down to</p> <p>15 a description or redacting in full -- I mean redacting</p> <p>16 in full is obviously no good at all -- cutting down even</p> <p>17 to a description is no good for the purposes of</p> <p>18 evaluating what weight can be given to the evidence --</p> <p>19 MRS JUSTICE ANDREWS: How do you know until you actually</p> <p>20 know what the descriptions are? It may be that if you</p> <p>21 are given at this juncture, Mr George's halfway house</p> <p>22 suggestion, which is that we park this until you have</p> <p>23 had disclosure on a limited basis, not the most</p> <p>24 satisfactory way of dealing with it, but you can then</p> <p>25 come back with a more specific request and say that</p> <p style="text-align: center;">Page 114</p>	<p>1 are willing to run, then so be it.</p> <p>2 MS COCKERILL: We are not willing to run it, my Lady, that's</p> <p>3 why your Ladyship has to be very careful about whether</p> <p>4 you go down this route. I understand the attraction.</p> <p>5 It's obviously -- appears like a practical solution but</p> <p>6 you must accept if you go down that route, that you may</p> <p>7 be effectively saying to the New York court that you</p> <p>8 won't help it, refusing the interests of comity in the</p> <p>9 practical sense. So I do urge you to think very</p> <p>10 carefully about it.</p> <p>11 MRS JUSTICE ANDREWS: I don't react terribly well to big</p> <p>12 sticks being waved, Ms Cockerill.</p> <p>13 MS COCKERILL: It's only a small stick.</p> <p>14 MRS JUSTICE ANDREWS: This court does not play lip service</p> <p>15 to the principle of comity. You will be getting all of</p> <p>16 the documents and all of the information that you</p> <p>17 require. The only issue between you is a fairly narrow</p> <p>18 one in relation to the identification of certain</p> <p>19 individuals. This court has a discretion in that</p> <p>20 regard, which is a discretion that's issued on questions</p> <p>21 of public policy and even my brother judge in the United</p> <p>22 States has recognised that the English court is the</p> <p>23 final arbitrator on questions of policy.</p> <p>24 MS COCKERILL: Indeed so, my Lady, I entirely accept that.</p> <p>25 And all I am saying to you is that it is an unusual</p> <p style="text-align: center;">Page 116</p>

<p>1 step, it is a step in favour of ruling in favour of</p> <p>2 confidentiality over litigation and I would just urge</p> <p>3 your Ladyship to be entirely happy that that is the</p> <p>4 right course in the light of the value of the evidence</p> <p>5 on confidentiality. That is what I'm coming to now.</p> <p>6 The question, really, which you have to examine is</p> <p>7 why is this the really, really unusual case which breaks</p> <p>8 the rule that litigation trumps confidentiality. One</p> <p>9 argument which is put forward is: well it's just like</p> <p>10 journalistic sources. Our answer to that is, well of</p> <p>11 course it isn't. This is nothing like journalist</p> <p>12 sources. The position for journalists is underpinned by</p> <p>13 a very strong public interest argument, as your Ladyship</p> <p>14 is aware, that the press are a watchdog of the citizens'</p> <p>15 rights and that they, as purveyors, hopefully, of fair</p> <p>16 and accurate information on matters of public</p> <p>17 importance, essentially underpin the exercise by</p> <p>18 individuals of a host of their other rights.</p> <p>19 That is in no way analogous to the paid gathering of</p> <p>20 commercial gossip and information for the private</p> <p>21 interests of corporations and individuals.</p> <p>22 The position of the investigator firms could hardly</p> <p>23 be further from the public interest argument in favour</p> <p>24 of confidentiality of journalist sources.</p> <p>25 Yes, some of the people who gather this information</p> <p style="text-align: center;">Page 117</p>	<p>1 MS COCKERILL: Well my Lady, my learned friend obviously</p> <p>2 prays that in aid and it is very attractive. But he is</p> <p>3 not doing it for a public interest purpose. He is doing</p> <p>4 it, essentially, for somebody else's commercial gain.</p> <p>5 So it is not analogous at all. Of course, that argument</p> <p>6 is being used to piggy back an argument that the entire</p> <p>7 investigative firm's process should be covered by</p> <p>8 a quasi journalistic public interest.</p> <p>9 MRS JUSTICE ANDREWS: No, Mr George is not going that far</p> <p>10 It's a very, very narrow point that's being taken about</p> <p>11 the interest, the overriding public interest, that</p> <p>12 individuals of this nature should not be deterred from</p> <p>13 providing this kind of information, which is of</p> <p>14 commercial value. It may be of a different type of</p> <p>15 value to the public value that is provided by sources to</p> <p>16 journalists but, nevertheless, this is information of</p> <p>17 a commercial value to people generally, and no doubt</p> <p>18 your own clients use sources of a similar nature in</p> <p>19 order to find out what's going on on the ground.</p> <p>20 If that sort of route to finding out what's going on</p> <p>21 in a country were to dry up all together, I dare say</p> <p>22 your clients would be first at the barricades</p> <p>23 complaining about it.</p> <p>24 MS COCKERILL: Well my Lady, there may be public interest in</p> <p>25 individual cases. That is not to say that there is</p> <p style="text-align: center;">Page 119</p>
<p>1 are ex-journalists but just because they are</p> <p>2 ex-journalists does not mean they carry round with them</p> <p>3 a right to public protection for the rest of their lives</p> <p>4 or when they are acting in a way when they are not</p> <p>5 journalists. Just because they choose to use some</p> <p>6 journalistic sources does not mean a journalist's rights</p> <p>7 attach to it because they are using, effectively, their</p> <p>8 sources for another purpose, at their and their source's</p> <p>9 risk.</p> <p>10 My learned friend says: well the approach of</p> <p>11 journalists' public policy protection does arise in</p> <p>12 other areas and gives in his skeleton at paragraph 32,</p> <p>13 a couple of examples. Again, where you tend to find</p> <p>14 this approach, in the cases that he's mentioned, you're</p> <p>15 looking at areas which very obviously engage a public</p> <p>16 interest. So unless you are looking at something in the</p> <p>17 public interest, the quasi journalist approach</p> <p>18 doesn't --</p> <p>19 MRS JUSTICE ANDREWS: It is not, in your submission, in the</p> <p>20 public interest that somebody would be willing, paid or</p> <p>21 unpaid, to provide an intelligence report about</p> <p>22 corruption in a particular country, potentially at risk</p> <p>23 to himself if he is found out doing it, A, because he's</p> <p>24 being paid for it and B, because he's not the source of</p> <p>25 a journalist's information?</p> <p style="text-align: center;">Page 118</p>	<p>1 public interest in the overall system, nor is it to say</p> <p>2 that if some confidential information is ordered to be</p> <p>3 disclosed in litigation, as your Ladyship says, that</p> <p>4 this affects the market. Because just because something</p> <p>5 is ordered under an order after a contested hearing in a</p> <p>6 very limited context, this isn't going to set the cat</p> <p>7 amongst the pigeons in the investigative market.</p> <p>8 MRS JUSTICE ANDREWS: Well it depends and that's why the</p> <p>9 facts and evidence before me matter. If it was simply</p> <p>10 a case of Livingstone saying "Our position in the market</p> <p>11 is going to be jeopardised because as a result of</p> <p>12 a court order, we've been forced to disclose information</p> <p>13 about our sources and we're then not going to be able to</p> <p>14 get anybody to trust us anymore", I would not be</p> <p>15 terribly impressed by that argument. But their evidence</p> <p>16 goes much further than that.</p> <p>17 MS COCKERILL: Well I think what your Ladyship wants me to</p> <p>18 concentrate on is essentially that paragraph in</p> <p>19 Mr Huband's evidence which is the closest that we get in</p> <p>20 any of the evidence to dealing with these matters in a</p> <p>21 detailed fashion.</p> <p>22 When we look at that, your Ladyship should bear in</p> <p>23 mind just how far that is from what is said generally.</p> <p>24 So these are specific examples which are given. They</p> <p>25 are the only specific examples which are given. My</p> <p style="text-align: center;">Page 120</p>

<p>1 point, essentially, today is this: if you are going to</p> <p>2 establish confidentiality, it needs to be done properly</p> <p>3 and compellingly. In the normal run of cases,</p> <p>4 your Ladyship will think of the various confidentiality</p> <p>5 cases of which you are aware. This isn't done in this</p> <p>6 way, with practically no details before the court, on</p> <p>7 the basis, largely, of broad assertions.</p> <p>8 Cases like Nasse and the Pharaon case and all these</p> <p>9 sorts of cases, you have somebody coming and saying,</p> <p>10 "Here I am, this is my right being infringed", or, "I am</p> <p>11 a party and I'm concerned that I'm going to infringe</p> <p>12 your rights of identified people in this way". This is</p> <p>13 not identified people in a particular way -- the example</p> <p>14 I was thinking of was in BCCI v Pharaon, where you have</p> <p>15 a bankers' confidentiality relationship, you know what</p> <p>16 is being disclosed in relation to exactly whom and the</p> <p>17 mere fact of disclosure infringes confidentiality in</p> <p>18 a way which the court would not normally allow, because</p> <p>19 the court is very strict about banker's client</p> <p>20 confidentiality. This is not this sort of case. You</p> <p>21 need to make out what is confidentiality, what is the</p> <p>22 nature of the obligation, what are the circumstances in</p> <p>23 which it arises.</p> <p>24 MRS JUSTICE ANDREWS: It's very narrow because unlike the</p> <p>25 banking cases, one isn't dealing with the failure to</p> <p style="text-align: center;">Page 121</p>	<p>1 anybody at all if they hadn't been promised that their</p> <p>2 names would be kept confidential. So the confidential</p> <p>3 information is simply the identification of named</p> <p>4 individuals.</p> <p>5 MS COCKERILL: But is it necessarily confidential? Just</p> <p>6 because somebody says they're going to maintain</p> <p>7 confidentiality, doesn't necessarily make the</p> <p>8 information confidential. You need to look at --</p> <p>9 MRS JUSTICE ANDREWS: It does if you make somebody a promise</p> <p>10 on the faith of which they disseminate information to</p> <p>11 you, then that is either a contractual promise or at</p> <p>12 least it is -- the information is disseminated in</p> <p>13 circumstances giving rise to an obligation of</p> <p>14 confidentiality which at least, according to</p> <p>15 Lord Denning, is enough to raise a duty of confidence.</p> <p>16 MS COCKERILL: Even in circumstances where the information</p> <p>17 is -- suppose you said that you were going to tell</p> <p>18 somebody the price of a loaf of bread in confidence,</p> <p>19 does that make the price of the loaf of bread</p> <p>20 confidential information?</p> <p>21 MRS JUSTICE ANDREWS: No, it doesn't but if I say to</p> <p>22 somebody "I will tell you what happened this morning in</p> <p>23 the Royal Courts of Justice if you promise that you</p> <p>24 won't leak the fact that I was the one who told you</p> <p>25 about it", and I then tell you that, what I have told</p> <p style="text-align: center;">Page 123</p>
<p>1 disclose information. The banking case, the banker has</p> <p>2 a duty of confidentiality to the client who banks with</p> <p>3 the bank and the court order will normally require that</p> <p>4 that evidence be disclosed, which may show that the</p> <p>5 client is up to no good or it may show that money has</p> <p>6 been transferred in and out of the client's accounts and</p> <p>7 so on. It's generally easy to show where the balancing</p> <p>8 exercise lies there because if somebody is coming to the</p> <p>9 court for the very good reason of wanting to get hold of</p> <p>10 that kind of information, ex hypothesi the</p> <p>11 confidentiality should yield to the interest in</p> <p>12 providing that information because it's needed in order</p> <p>13 to find out where the money went or what was going on.</p> <p>14 But here, the confidential information is not what</p> <p>15 the source told somebody. You're going to get that.</p> <p>16 What the source actually said is going to be divulged.</p> <p>17 What was made of it is going to be divulged. The view</p> <p>18 that was taken by the person to whom it was divulged of</p> <p>19 the reliability of that information, is going to be</p> <p>20 divulged because if they didn't think it was reliable,</p> <p>21 it wouldn't be in the report.</p> <p>22 So you're getting all of that. The one thing you're</p> <p>23 not getting is that it was John Smith or Fred Bloggs who</p> <p>24 gave the information. That is because John Smith and</p> <p>25 Fred Bloggs would not have given that information to</p> <p style="text-align: center;">Page 122</p>	<p>1 you may not be confidential, but my name certainly</p> <p>2 would. And that's the distinction that we're drawing</p> <p>3 here.</p> <p>4 MS COCKERILL: My Lady --</p> <p>5 MRS JUSTICE ANDREWS: If the information is out there in the</p> <p>6 public domain, then it cannot be confidential. If it is</p> <p>7 already confidential but somebody is not actually</p> <p>8 breaking any -- I'm told that none of this involves any</p> <p>9 of the individuals concerned doing anything unlawful.</p> <p>10 And I must take that at face value.</p> <p>11 MS COCKERILL: I think the discussion we have just had</p> <p>12 illustrates quite precisely why the detail of the</p> <p>13 circumstances is important. Because what you have here</p> <p>14 is a variety of versions of the circumstances which gave</p> <p>15 rise to the confidentiality. You've got, well some</p> <p>16 people were told explicitly there were specific</p> <p>17 agreements, it was implicit. The story in relation to</p> <p>18 specific witnesses -- not witnesses, sources, is not</p> <p>19 made clear. This is not a case where you have source A,</p> <p>20 the source of the confidentiality is a specific</p> <p>21 agreement on such and --</p> <p>22 MRS JUSTICE ANDREWS: I am told in relation to all of the</p> <p>23 people in one particular clutch that there was</p> <p>24 a specific agreement with each and every one of them</p> <p>25 entered into. That is the one of the three business</p> <p style="text-align: center;">Page 124</p>

<p>1 entities that did not have an agreement with Rio Tinto.</p> <p>2 It didn't have the standard form agreement, whichever</p> <p>3 one it is. I keep forgetting who is who.</p> <p>4 MS COCKERILL: ARC.</p> <p>5 MRS JUSTICE ANDREWS: ARC. I don't know if -- you have</p> <p>6 a copy, I think, of Mr George's schedule,</p> <p>7 Ms Cockerill -- in relation to ARC, I think the evidence</p> <p>8 is all one way, isn't it?</p> <p>9 MS COCKERILL: Well the position in relation to ARC is --</p> <p>10 it's, again, a little nuanced:</p> <p>11 "The name of the source who provided the information</p> <p>12 ... in strict conditions. Their identity is a source of</p> <p>13 that information ... remain confidential."</p> <p>14 MRS JUSTICE ANDREWS: What's uncertain about that? It's</p> <p>15 pretty clear, isn't it?</p> <p>16 MS COCKERILL: Your Ladyship is right, I was misremembering</p> <p>17 the --</p> <p>18 MRS JUSTICE ANDREWS: I think ARC is straightforward. It</p> <p>19 may be more nuanced in relation to the other two but</p> <p>20 ARC, the evidence is very clear, they made it a strict</p> <p>21 condition of providing the information, that their</p> <p>22 identity was not to be disclosed under any</p> <p>23 circumstances. So that's, on the face of it,</p> <p>24 information that's provided in circumstances where the</p> <p>25 name of the individual is subject to an express promise</p> <p style="text-align: center;">Page 125</p>	<p>1 again, although they look more particular and</p> <p>2 your Ladyship, I know, is attracted by going down this</p> <p>3 route, if you just look at them: source A:</p> <p>4 "A well placed Guinean government official who's</p> <p>5 witnessed the key events and conversations.</p> <p>6 "What sorts of key events and conversations?"</p> <p>7 MRS JUSTICE ANDREWS: You will know that when you marry</p> <p>8 source A to the information that is attributed to him or</p> <p>9 her.</p> <p>10 MS COCKERILL: But again, my Lady, that's cart before the</p> <p>11 horse. To an extent, if my learned friend wants to say</p> <p>12 he's getting to the extent of a confidentiality that</p> <p>13 overrides the starting point which is to provide, what</p> <p>14 we ought to be seeing is something like Mr Kelly's</p> <p>15 schedule saying: in relation to each segment, or each</p> <p>16 source, this is the basis on which the information was</p> <p>17 given and this is the description of the information</p> <p>18 they gave and who they are and why it causes them</p> <p>19 a difficulty.</p> <p>20 Which would then stop you getting to the point:</p> <p>21 "... should thus be seen as a potential target of</p> <p>22 recrimination."</p> <p>23 That's not fact, that's submission. That is not</p> <p>24 a basis for concluding that the name should not be</p> <p>25 disclosed.</p> <p style="text-align: center;">Page 127</p>
<p>1 to keep it confidential.</p> <p>2 Begbies' specific undertakings were entered into.</p> <p>3 And Mr Brown, on the basis I think, of the preceding</p> <p>4 paragraph, told Mr Humphrey that he provided them with</p> <p>5 specific assurances.</p> <p>6 MS COCKERILL: Yes. That's the evidently provided --</p> <p>7 MRS JUSTICE ANDREWS: There was the sort of assumption that</p> <p>8 Mr Leighton would have acted likewise.</p> <p>9 MR GEORGE: It's paragraph 17 of Mr Humphrey and we looked</p> <p>10 earlier, and for Mr Huband it's paragraph 18, who in</p> <p>11 fairness, also says:</p> <p>12 "I can confirm that each of the sources who have</p> <p>13 been identified will have received a specific</p> <p>14 assurance."</p> <p>15 MS COCKERILL: It's a "will have" and in relation to</p> <p>16 Livingstone, you also have "the sources implicitly</p> <p>17 understand that their anonymity is protected."</p> <p>18 MRS JUSTICE ANDREWS: Yes, well, Mr Huband is a little bit</p> <p>19 more woolly.</p> <p>20 MS COCKERILL: Yes. So all I'm saying, my Lady, is this,</p> <p>21 that in relation to Mr Huband, you have sort of one side</p> <p>22 of it to an extent, but not the other. You don't have</p> <p>23 this witness -- this source was providing information</p> <p>24 pursuant to this particular understanding. But then you</p> <p>25 do have some description of what the source is, but</p> <p style="text-align: center;">Page 126</p>	<p>1 MRS JUSTICE ANDREWS: Why? I mean, the court can take</p> <p>2 judicial notice, surely, of what goes on in countries</p> <p>3 such as Guinea.</p> <p>4 MS COCKERILL: This is a point I wanted to address with</p> <p>5 your Ladyship -- I'm sorry, your Ladyship was going to</p> <p>6 say, you should say judicial notice of what goes on in</p> <p>7 countries like Guinea. That's exactly the sort of</p> <p>8 approach that, for example, in a forum conveniens-type</p> <p>9 argument, one shouldn't lightly assume that other</p> <p>10 countries do not operate in a proper manner and you</p> <p>11 don't have --</p> <p>12 MRS JUSTICE ANDREWS: So we don't live in the real world,</p> <p>13 Ms Cockerill, we have to live in an assumption that</p> <p>14 everybody behaves in exactly the same way as the US and</p> <p>15 the UK.</p> <p>16 MS COCKERILL: Well one might say that making that sort of</p> <p>17 assumption is an improper or undiverse approach.</p> <p>18 MRS JUSTICE ANDREWS: It may well be an improper and</p> <p>19 undiverse approach, it may also be a sensible one. I am</p> <p>20 going on the evidence that's before me. I can't dismiss</p> <p>21 this evidence out of hand on the basis that you say</p> <p>22 I should assume that every foreign government does not</p> <p>23 behave like Mr Mugabe in Zimbabwe.</p> <p>24 MS COCKERILL: No, my Lady, I am saying you should assume</p> <p>25 nothing against a foreign government or foreign</p> <p style="text-align: center;">Page 128</p>

<p>1 governmental procedures until you have evidence which</p> <p>2 justifies it, which is the way one would proceed in</p> <p>3 other areas in relation to this. You shouldn't assume</p> <p>4 that a judgment given by a foreign court is no good</p> <p>5 unless you have evidence that their justice system is</p> <p>6 not good.</p> <p>7 What you have in relation to this, you have</p> <p>8 Ms O'Connor saying that, some years ago, somebody she</p> <p>9 knew was put in prison. That was back in the Conde</p> <p>10 regime, which I think went out in 2008.</p> <p>11 There have been some --</p> <p>12 MRS JUSTICE ANDREWS: That's the material period, isn't it</p> <p>13 or one of the material periods, pre 2010?</p> <p>14 MS COCKERILL: Yes, but we are looking at danger to</p> <p>15 witnesses now. What my learned friend needs to be</p> <p>16 addressing is if these people are said to be in danger,</p> <p>17 what is the evidence that they will be in danger now?</p> <p>18 I'm just asking you to consider that. We would say that</p> <p>19 what you have, really isn't enough to make negative</p> <p>20 assumptions about a foreign regime.</p> <p>21 MRS JUSTICE ANDREWS: Just suppose, Ms Cockerill, just</p> <p>22 suppose -- I have to remember that none of these</p> <p>23 individuals, possibly even knows what's going on in this</p> <p>24 court. They have had no opportunity to come and make</p> <p>25 any submissions to this court about whether or not this</p> <p style="text-align: center;">Page 129</p>	<p>1 be in danger of breaching confidentiality towards and to</p> <p>2 give them the opportunity to be heard, or at least to</p> <p>3 put in evidence through them.</p> <p>4 MRS JUSTICE ANDREWS: Perhaps I should adjourn this</p> <p>5 application to give them that opportunity.</p> <p>6 MS COCKERILL: My Lady, I am not asking you to do that</p> <p>7 because that was a matter for the investigative firms.</p> <p>8 They have delayed long enough in relation to this</p> <p>9 evidence. All I'm saying is that you shouldn't assume</p> <p>10 that there has been no opportunity, that they have had</p> <p>11 no chance at all to appear because there is an</p> <p>12 opportunity to appear.</p> <p>13 I am not sure how much further I can take this.</p> <p>14 I know my submissions are finding unparalleled favour</p> <p>15 with you.</p> <p>16 Can I just ask you to go with me and look at</p> <p>17 Mr Huband's paragraph that we were talking about and</p> <p>18 I will promise you I will sit down shortly and stop</p> <p>19 annoying you.</p> <p>20 MRS JUSTICE ANDREWS: No, I am not stopping you at all, I am</p> <p>21 just testing the proposition to destruction,</p> <p>22 Ms Cockerill, to see how far I need to go.</p> <p>23 Mr Huband's paragraph?</p> <p>24 MS COCKERILL: Yes. Your Ladyship yourself went through</p> <p>25 this list and I would just like you to run through it</p> <p style="text-align: center;">Page 131</p>
<p>1 information should be revealed. They may well be out of</p> <p>2 the jurisdiction, they may not have access to legal</p> <p>3 advice and just suppose their name comes out and</p> <p>4 something nasty happens to them in consequence.</p> <p>5 They have not had a fair hearing before this court</p> <p>6 because they haven't had an opportunity to explain to</p> <p>7 the court what dangers they are facing. Why should</p> <p>8 I take that risk?</p> <p>9 MS COCKERILL: I understand entirely where your Ladyship</p> <p>10 comes from on that. I do see your point. I should</p> <p>11 just --</p> <p>12 MRS JUSTICE ANDREWS: You say the evidence isn't of</p> <p>13 a sufficiently concrete quality for me to assume that</p> <p>14 that risk is a realistic one, as opposed to a purely</p> <p>15 theoretical risk.</p> <p>16 MS COCKERILL: I do say that, my Lady. I also say that when</p> <p>17 you say they haven't had an opportunity to be present,</p> <p>18 that isn't, actually, strictly right. They have a right</p> <p>19 to be heard at this hearing. If there is a threatened</p> <p>20 breach of confidentiality, there is authority to that</p> <p>21 effect.</p> <p>22 MRS JUSTICE ANDREWS: The order cannot have been served on</p> <p>23 them, it's only been served on the three companies.</p> <p>24 MS COCKERILL: It is absolutely open to the investigative</p> <p>25 companies to notify the people who they think they would</p> <p style="text-align: center;">Page 130</p>	<p>1 again. We have looked at source A and I have said</p> <p>2 should -- "long established ex-patriot figure."</p> <p>3 Ex-patriot where? Ex-patriot here? Ex-patriot from</p> <p>4 here in Guinea?</p> <p>5 "Must be seen as likely to create the possibility of</p> <p>6 recrimination by those whose activities --"</p> <p>7 MRS JUSTICE ANDREWS: He, I think, is one of the two</p> <p>8 associates.</p> <p>9 MS COCKERILL: Yes. He is one of the associates.</p> <p>10 MRS JUSTICE ANDREWS: I was, in principle, thinking that</p> <p>11 there was not a reason not to reveal who the associates</p> <p>12 were because these are people who have actually been</p> <p>13 enlisted specifically to go and dig out information.</p> <p>14 MS COCKERILL: Yes.</p> <p>15 MRS JUSTICE ANDREWS: So in the absence of some pretty</p> <p>16 strong evidence that they're going to be jeopardised, an</p> <p>17 associate, I would have thought, in principle, subject</p> <p>18 to Mr George persuading me to the contrary, associate</p> <p>19 really ought to be divulged. That is subject, of</p> <p>20 course, to the overall question of relevance, which I am</p> <p>21 still far from persuaded on, I am bound to say.</p> <p>22 But in terms of the overriding of confidentiality,</p> <p>23 I am not sure that the evidence in relation to</p> <p>24 associates is that strong. It's the sources, isn't it?</p> <p>25 MS COCKERILL: Yes.</p> <p style="text-align: center;">Page 132</p>



<p>1 MRS JUSTICE ANDREWS: The people who are still there,  2 somebody who's a long established executive, people who  3 are actually still involved in the political world.  4 MS COCKERILL: Again, "long established mining sector  5 executive." Doesn't actually say he is based in Guinea.  6 It says he's assisted Livingstone in several different  7 enquiries into regional corruption. So again, and  8 yourself, I think you raised the question of why in  9 relation to this:  10 "Another senior executive with BSGR whose insights  11 into the company's operations ... personal acquaintance  12 with our associate."  13 What sort of role has he got? Where is he based?  14 Because if we are saying these people are -- we are  15 protecting their confidentiality because they would be  16 at risk of being hauled into prison and the thumbscrews  17 attached, you know, we need to know where they are in  18 order to assess whether that's a risk. Because if these  19 people are based in London, it isn't.  20 MRS JUSTICE ANDREWS: It's not just a question of being  21 hauled into prison with thumbscrews, it's a question of  22 whether it's going to jeopardise their employment  23 relationship or expose them to recriminations within the  24 companies within which they work.  25 MS COCKERILL: Fine. If it's about their employment</p> <p style="text-align: center;">Page 133</p>	<p>1 MRS JUSTICE ANDREWS: You are talking about it as a right to  2 see the documents. You have a letter of request, you  3 have a court order. The question is: do you have  4 a right? You only have a right to see these documents  5 if they are necessary and relevant.  6 MS COCKERILL: That is not an issue. The documents are  7 accepted as relevant. The sources are part of that  8 material. Therefore --  9 MRS JUSTICE ANDREWS: The sources are not accepted as being  10 relevant, that's what you've been arguing about for the  11 last three hours, isn't it?  12 MS COCKERILL: It is, my Lady, but you only get to the  13 sources if you get to confidentiality and then you are  14 arguing about the relevance of the particular  15 material --  16 MRS JUSTICE ANDREWS: I don't see that. I think you are  17 putting it the wrong way round. First of all, you have  18 to say: is this information relevant? If it is  19 relevant, then the question of confidentiality comes in  20 as to whether or not it should be or not be disclosed.  21 If it is irrelevant, then we don't even get as far  22 as confidentiality. Because you don't need it.  23 MS COCKERILL: The way the application proceeds, as  24 your Ladyship says, is that we have an order that my  25 learned friend is applying to redact, so where it does</p> <p style="text-align: center;">Page 135</p>
<p>1 relationship, if they divulge the information not in  2 breach of contract, no issue. If they divulge the  3 information in breach of contract, that is not something  4 the court should be protecting.  5 MRS JUSTICE ANDREWS: I am told there's no illegality  6 involved.  7 MS COCKERILL: So there we are. If they divulge the  8 information not in breach of contract, what is the basis  9 of saying it's going to affect their employment? What  10 right does anybody have to complain if they are not  11 doing anything wrong in terms of their contract?  12 MRS JUSTICE ANDREWS: Well we all know that perceptions are  13 very different from legal realities, that whether or not  14 the legal rights or wrongs are in favour of confidence,  15 it may be seen as disloyalty, to just put it in a  16 neutral way, that you would even be talking about the  17 company's business behind their back with somebody like  18 Livingstone.  19 MS COCKERILL: This is what you should be being told here,  20 that the confidentiality matters because although  21 there's not a breach of contract, they are operating in  22 a community where it would be perceived as a breach of  23 loyalty or whatever. You are being asked, basically, to  24 overturn my client's right to see these documents. In  25 particular parts --</p> <p style="text-align: center;">Page 134</p>	<p>1 proceed is that my learned friend needs to establish  2 that right. So the burden is on him --  3 MRS JUSTICE ANDREWS: If he persuades me it's irrelevant  4 information, he can redact on that basis alone, surely?  5 Which is why I started this whole process by asking the  6 question of both of you, was not the foundation for this  7 application for disclosure, the limitation point?  8 The whole basis on which this request was  9 launched -- and I am going to stop for the shorthand  10 writer in a minute -- was not the whole basis on which  11 this application was launched, a requirement to have  12 documents to enable you to make good your argument that  13 there were red flags, or that Rio Tinto could jolly well  14 have got their act together much earlier. And it will  15 also be of relevance to find out what Rio Tinto has to  16 say about its equitable tolling defence, whether or not  17 there is material on which they can rely to say: well we  18 couldn't have acted this way further because we couldn't  19 have got past this particular obstacle. That's what  20 it's all about. I can see if you had launched this  21 application on the basis: well it's relevant to the  22 underlying action to know what the reliability of this  23 information is, it might have been a slightly different  24 matter. But apart from the odd little passage in  25 Mr Kelly, I've got no information that it goes beyond</p> <p style="text-align: center;">Page 136</p>

<p>1 limitation.</p> <p>2 MS COCKERILL: Well my Lady, I have, I think, addressed you</p> <p>3 on the subject of whether the letter of request goes to</p> <p>4 the underlying merits as well. And I have addressed you</p> <p>5 at some length, I think, already, on -- the nature of</p> <p>6 the lead, who the lead is, the reliability of the lead,</p> <p>7 is very important in the context of equitable tolling</p> <p>8 and the various shades that come within fraudulent</p> <p>9 concealment. Which also include things like what</p> <p>10 information was known by other people that they may have</p> <p>11 tipped BSGR off to. I think I have covered all of those</p> <p>12 points.</p> <p>13 If your Ladyship was minded to stop for the</p> <p>14 shorthand writer, maybe we could stop for five minutes</p> <p>15 and I will say anything very brief I need to, following</p> <p>16 that.</p> <p>17 MRS JUSTICE ANDREWS: Don't feel under any pressure of time.</p> <p>18 I think it's getting to the stage where even if I were</p> <p>19 against you, Ms Cockerill, I would probably want to</p> <p>20 formulate my thoughts overnight.</p> <p>21 I know that both of you want a speedy response but</p> <p>22 I think this is too important to give an off the cuff</p> <p>23 determination.</p> <p>24 MR GEORGE: My Lady, we could not agree more. Our urging</p> <p>25 for speed, we would not in any way to sacrifice -- this</p> <p style="text-align: center;">Page 137</p>	<p>1 most to your Ladyship, we are content with.</p> <p>2 MRS JUSTICE ANDREWS: Obviously, a formal reserve judgment</p> <p>3 is going to take a little longer to formulate but the</p> <p>4 more I think about it, the more I worry that trying to</p> <p>5 do it extempore may not be the best thing for both the</p> <p>6 parties and if you have something in writing from me,</p> <p>7 then at least --</p> <p>8 MR GEORGE: Certainly my instructions are that there are</p> <p>9 a number of participants actively in the industry who</p> <p>10 would wish to read and consider, as you say, for the</p> <p>11 wider implications of a judgment in this and the more</p> <p>12 reasoned -- an extempore would be entirely reasoned but</p> <p>13 in a sense, any opportunity for further reflection</p> <p>14 should be taken and certainly there will be no prejudice</p> <p>15 to the weekend.</p> <p>16 MRS JUSTICE ANDREWS: All right, we will proceed on that</p> <p>17 basis. You can both proceed on the basis that I will</p> <p>18 reserve judgment until at least tomorrow, probably until</p> <p>19 Monday, and I will hear whatever either of you have to</p> <p>20 say in terms of further argument today and then we will</p> <p>21 reconvene at a convenient moment. I will stop for the</p> <p>22 shorthand writer. Ten minutes.</p> <p>23 (2.54 pm)</p> <p>24 (A short break)</p> <p>25 (3.04 pm)</p> <p style="text-align: center;">Page 139</p>
<p>1 is an important point and it does not come up that often</p> <p>2 and there is a great deal of material for my Lady.</p> <p>3 MRS JUSTICE ANDREWS: I also think that you have both raised</p> <p>4 an issue which might have ramifications beyond the</p> <p>5 instant case in terms of the confidentiality and how the</p> <p>6 court should approach it. So I am not rushing either of</p> <p>7 you. The two potential courses that are going through</p> <p>8 my mind at the moment, with or without giving you an</p> <p>9 indication of where I am this evening, would be either</p> <p>10 to think about it overnight and give you an extempore</p> <p>11 judgment tomorrow or to reserve it until Monday and hand</p> <p>12 it down on Monday.</p> <p>13 MR GEORGE: My Lady, I don't believe -- we would be more</p> <p>14 than content with Monday, if that was convenient to</p> <p>15 your Lady. Equally, I am available tomorrow morning if</p> <p>16 that was convenient to my Lady.</p> <p>17 MRS JUSTICE ANDREWS: Let's see where we are at the end of</p> <p>18 the legal argument. I think what I will do is hear the</p> <p>19 rest of the legal argument today. I won't give you</p> <p>20 a snap decision, I think it's far too important to do</p> <p>21 that. But you will get a decision by no later than</p> <p>22 Monday and by close of business today I will have</p> <p>23 a thought as to how it's going to be done.</p> <p>24 MS COCKERILL: We are very grateful to your Ladyship.</p> <p>25 I think for our part, whichever course commends itself</p> <p style="text-align: center;">Page 138</p>	<p>1 MS COCKERILL: Good afternoon again, my Lady. We left</p> <p>2 matters in the middle of Mr Huband's paragraph 24. I am</p> <p>3 not going to go through each one of these line by line</p> <p>4 but I would just ask your Ladyship -- your Ladyship</p> <p>5 raised a number of questions in relation to these and</p> <p>6 rightly so, I would submit.</p> <p>7 When your Ladyship considers the question of whether</p> <p>8 you should proceed down this line that we've been</p> <p>9 discussing, of whether there should be a further</p> <p>10 description of the sources whose identities are to be</p> <p>11 redacted, if there is to be redaction, you should look</p> <p>12 very carefully at whether that can be a satisfactory</p> <p>13 route and how much detail there would have to be.</p> <p>14 In my submission, if you wanted to go down that</p> <p>15 route, there would have to be more detail in terms of</p> <p>16 the category to which -- the category of disclosure, the</p> <p>17 lead, to which the source related, where they were</p> <p>18 operating, the nature of their position and the evidence</p> <p>19 for risk, so that one has rather more detail than here.</p> <p>20 I was making a point earlier about a senior</p> <p>21 political source close to government or close to the</p> <p>22 president and I made the tea boy joke. It's a valid</p> <p>23 point in itself but my instructing solicitor has</p> <p>24 reminded me that the Iraq war, for example, we have</p> <p>25 sources close to the government in Iraq, underlying the</p> <p style="text-align: center;">Page 140</p>

<p>1 dossiers there and "close to" turned out to be something</p> <p>2 rather different. So your Ladyship sees there is ample</p> <p>3 scope for not only not helping but positively</p> <p>4 distracting attention or leading away from a true</p> <p>5 analysis of whether a source should be valued or not.</p> <p>6 When we come to the question of relevance which</p> <p>7 I won't say much more but your Ladyship needs to</p> <p>8 understand that when you're looking at equitable tolling</p> <p>9 and so forth, you do need to understand what leads</p> <p>10 should have been followed and the question of whether</p> <p>11 a lead should have been followed may depend, crucially,</p> <p>12 on the nature of their information, who they were, as to</p> <p>13 whether they were a reputable source or the tea boy or</p> <p>14 whatever.</p> <p>15 MRS JUSTICE ANDREWS: One has to be careful not to mix up</p> <p>16 the question of what leads should have been followed by</p> <p>17 Rio Tinto with the knowledge of the individual business</p> <p>18 investigation entities.</p> <p>19 Business investigation entities' knowledge is to be</p> <p>20 attributed for the purposes of New York law, to the</p> <p>21 people who commission them. So the knowledge of</p> <p>22 Livingstone is attributed to Rio Tinto. So if</p> <p>23 Livingstone consider that they have reliable information</p> <p>24 from Mr X that there is going to be a coup, just to take</p> <p>25 a hypothetical example, they themselves evaluate it as</p> <p style="text-align: center;">Page 141</p>	<p>1 nail, with or without the degree of success.</p> <p>2 MS COCKERILL: This is, it seems to us, a very interesting</p> <p>3 point, the question of confidentiality. Because that</p> <p>4 was a point I raised at the outset. Your Ladyship</p> <p>5 cannot simply say that RT couldn't have obtained this</p> <p>6 confidential information. Your Ladyship will recall</p> <p>7 that in Mr Kelly's statement there's a paragraph about</p> <p>8 how all of these companies hold themselves out as</p> <p>9 effectively providing litigation support. To the extent</p> <p>10 that what was being done was litigation support, it's</p> <p>11 a necessary part of what you would expect, that the</p> <p>12 person who's seeking the information gets information</p> <p>13 for you so that you can call witnesses. So they would</p> <p>14 inevitably expect to be allowed the names of the</p> <p>15 witnesses and it should be noted, my Lady, that --</p> <p>16 MRS JUSTICE ANDREWS: That's why clause 16 is no doubt</p> <p>17 couched in the wide terms that it is. I think, for what</p> <p>18 it's worth, that Mr George is wrong on the</p> <p>19 interpretation of the contract and it has an English law</p> <p>20 clause in it, I've noticed. I think Rio Tinto would</p> <p>21 probably be entitled to call for information, possibly</p> <p>22 even as to the name of the source, for that very reason.</p> <p>23 MS COCKERILL: What I would say is this, my Lady.</p> <p>24 MRS JUSTICE ANDREWS: But they might not get it very easily</p> <p>25 they might have to go to litigation in order to get it.</p> <p style="text-align: center;">Page 143</p>
<p>1 reliable and there's an internal memo which says "We</p> <p>2 have information from an impeccable source that there's</p> <p>3 going to be a coup", and then let's say a coup happens.</p> <p>4 You can evaluate the reliability of the information</p> <p>5 without knowing who the source was, because you have the</p> <p>6 facts following upon the provision of the information to</p> <p>7 enable you to put two and two together.</p> <p>8 That deals with the reliance that is placed by the</p> <p>9 investigating person upon the source.</p> <p>10 When one is dealing with what Rio Tinto should have</p> <p>11 followed up, we are dealing with very different</p> <p>12 territory, aren't we, because they are not told who the</p> <p>13 sources are, except insofar as it's in the reports</p> <p>14 already and there's no argument about that.</p> <p>15 So the question becomes: so Rio Tinto have asked the</p> <p>16 investigators who the sources were, and if they'd asked,</p> <p>17 would they have actually got the information out of</p> <p>18 them? Would that have left them any better off? I am</p> <p>19 not sure that the answer to that will be productive from</p> <p>20 your perspective because you may be able to attribute</p> <p>21 the business entities' knowledge to Rio Tinto, even</p> <p>22 though they don't have it, but insofar as what Rio Tinto</p> <p>23 themselves should have done, given the attitude that is</p> <p>24 taken to confidentiality now, if they tried to get hold</p> <p>25 of that information, they would have fought tooth and</p> <p style="text-align: center;">Page 142</p>	<p>1 MS COCKERILL: I don't know. This is something that you may</p> <p>2 want to raise with my learned friend. Certainly in the</p> <p>3 US, RT positively assert that the work done was</p> <p>4 litigation support, and if that was the case, then it</p> <p>5 would be bizarre if the set-up was such that the</p> <p>6 contract required them to litigate.</p> <p>7 So my submission is that, in relation to that, to</p> <p>8 the extent that that's troubling you, you should</p> <p>9 certainly be very slow to conclude that the answer is in</p> <p>10 confidentiality, if you're not actually satisfied of</p> <p>11 that position as to litigation support is wrong. I am</p> <p>12 not entirely sure what my learned friend has to say</p> <p>13 about that.</p> <p>14 If it's the case that RT had the right to those</p> <p>15 witness names, there was no real confidentiality, RT</p> <p>16 would have the right to that information in the States</p> <p>17 or anywhere and it would effectively put the rights of</p> <p>18 the New York court and of the people who RT are now</p> <p>19 suing, behind RT. They could have this material and we</p> <p>20 couldn't. Unless your Ladyship is given some --</p> <p>21 MRS JUSTICE ANDREWS: But they haven't got it. If they had</p> <p>22 it, if it was within their knowledge now, the court in</p> <p>23 New York could tell Rio Tinto to divulge that</p> <p>24 information and we wouldn't be having this argument</p> <p>25 here.</p> <p style="text-align: center;">Page 144</p>

<p>1 MS COCKERILL: If they had it, yes. They don't have it at</p> <p>2 the moment, but the question is, could they have had it?</p> <p>3 Could they have it.</p> <p>4 MRS JUSTICE ANDREWS: That's all part and parcel of the</p> <p>5 argument about whether this is information within their</p> <p>6 possession, power, custody or control, for which I was</p> <p>7 shown that excerpt of the argument that was before the</p> <p>8 judge.</p> <p>9 MS COCKERILL: Yes, my Lady, but it's also a question for</p> <p>10 here, the question of whether my learned friends can't</p> <p>11 say that it really is a case that it's litigation</p> <p>12 support because if they agree with RT that it's</p> <p>13 litigation support, then that throws a fairly major</p> <p>14 spanner in the works of saying confidentiality. If they</p> <p>15 say it's not litigation support, then so be it.</p> <p>16 You know, at least your Ladyship knows when she is</p> <p>17 grappling with this rather difficult situation, that</p> <p>18 there is not that anomaly. It's a very interesting</p> <p>19 anomaly that RT say in the States, something which</p> <p>20 indicates powerfully that this would not be treated as</p> <p>21 confidential between RT and the litigation support</p> <p>22 companies.</p> <p>23 MRS JUSTICE ANDREWS: So you say that from RT's perspective,</p> <p>24 they say that it's litigation support and that means the</p> <p>25 information would not be confidential as between the</p> <p style="text-align: center;">Page 145</p>	<p>1 going in that direction, urge you to say should be</p> <p>2 a better, fuller description tied to the particular</p> <p>3 piece of information -- that is only a course to go</p> <p>4 down, effectively, if you are satisfied about</p> <p>5 confidentiality. That confidentiality is trumping what</p> <p>6 I'm saying in terms of the need for sources in the</p> <p>7 States.</p> <p>8 If you look in the round and you see well, you know,</p> <p>9 we are looking at rather broad assertions in relation to</p> <p>10 confidentiality and we do have this rather strange</p> <p>11 situation where it does appear that RT are saying that</p> <p>12 this is stuff which they ought to have been able to get</p> <p>13 hold of because it was litigation support, then you</p> <p>14 might take the view: well, I don't need to go there</p> <p>15 because it cannot be confidential and it cannot be right</p> <p>16 to treat as confidential, when RT could have had</p> <p>17 a different position.</p> <p>18 MRS JUSTICE ANDREWS: What was the outcome of the</p> <p>19 application? I saw the transcript. There's obviously</p> <p>20 an application against RT on the basis that they were</p> <p>21 entitled to compel the entities to produce information</p> <p>22 and that must have fallen on stoney ground.</p> <p>23 MS COCKERILL: I think, my Lady, the outcome of that was the</p> <p>24 writing of the letters. It was the first letter which</p> <p>25 was written where RT effectively said "We're writing to</p> <p style="text-align: center;">Page 147</p>
<p>1 entities --</p> <p>2 MS COCKERILL: Exactly.</p> <p>3 MRS JUSTICE ANDREWS: -- and RT. Quite apart from the right</p> <p>4 as against two of them, the contractual right to call</p> <p>5 for it.</p> <p>6 On the other hand, you then get a tension because</p> <p>7 the evidence before me is that in relation to the third</p> <p>8 of them, there was an express promise given by Rio Tinto</p> <p>9 that it wouldn't ask for who the sources were.</p> <p>10 So even if the business is one of litigation</p> <p>11 support, you have a contractual promise not to ask for</p> <p>12 it.</p> <p>13 MS COCKERILL: It would be rather odd but if that's the</p> <p>14 answer, that's the answer.</p> <p>15 MRS JUSTICE ANDREWS: That's the evidence, that's the</p> <p>16 evidence at the moment.</p> <p>17 MS COCKERILL: I do not think your Ladyship has had an</p> <p>18 answer on litigation support because if that were the</p> <p>19 case, it would effectively lead to another anomaly. But</p> <p>20 I just flag that up as a matter that while your Ladyship</p> <p>21 is grappling with how do you balance these competing</p> <p>22 demands and the potential possibility of going down the</p> <p>23 route that your Ladyship has indicated, of coming up</p> <p>24 with some regime whereby the individual investigative</p> <p>25 firms give a description -- which I would, if you're</p> <p style="text-align: center;">Page 146</p>	<p>1 you because of some litigation in the States", and then</p> <p>2 there's the second letter where the judge says "No, no,</p> <p>3 no, no, no, you send a clean letter." And that then</p> <p>4 dovetails back into the question of where RT stand in</p> <p>5 relation to this particular application.</p> <p>6 My Lady, I am conscious I have troubled you for</p> <p>7 quite a long time. I do not think there's a huge amount</p> <p>8 that I can add but, obviously, if there are questions on</p> <p>9 particular issues. I think we dealt with the</p> <p>10 specificity areas and so forth this morning. It really</p> <p>11 is just the confidentiality this afternoon so --</p> <p>12 MRS JUSTICE ANDREWS: Well I think both of you have enough</p> <p>13 of a steer in relation to the other matters, to be</p> <p>14 moving towards getting the right kind of order. At</p> <p>15 least as far as the specificity is concerned. It's</p> <p>16 confidentiality, really, that you're waiting for me.</p> <p>17 MS COCKERILL: I am reminded of one final thing. We have</p> <p>18 flagged it up, I did mention it earlier, but there is</p> <p>19 the question of the protective order in the States.</p> <p>20 That is a simpler way through.</p> <p>21 MRS JUSTICE ANDREWS: Well any order I make is going to be</p> <p>22 subject to that protective order anyway.</p> <p>23 MS COCKERILL: But we would obviously suggest that --</p> <p>24 MRS JUSTICE ANDREWS: You say that is good enough, I'm not</p> <p>25 sure it is. But I have to think about it. And</p> <p style="text-align: center;">Page 148</p>

<p>1 I promise you I will give it quite a lot of</p> <p>2 consideration. As I say, the more I think about it, the</p> <p>3 more I think this case is not one for snap judgments.</p> <p>4 MS COCKERILL: I am very grateful to your Ladyship.</p> <p>5 Submissions by MR GEORGE</p> <p>6 MR GEORGE: My Lady, I don't wish to traverse all of the</p> <p>7 ground because it's been canvassed in a number of</p> <p>8 debates but may I address you, just in reply, on that</p> <p>9 last point of litigation support because in my</p> <p>10 submission it was a false basis to say that there is</p> <p>11 ambiguity or that my Lady does not know the position of</p> <p>12 the respondents.</p> <p>13 Again, having to find these witness statements,</p> <p>14 I know is frustrating but I am afraid, my Lady, it's</p> <p>15 Ms O'Connor number 2.</p> <p>16 MRS JUSTICE ANDREWS: I have that loose.</p> <p>17 MR GEORGE: Paragraph 10. This is in response to Mr Kelly:</p> <p>18 "The litigation support referred to on ARC's website</p> <p>19 refers to ARC support function in substantial</p> <p>20 litigations which ARC is retained by legal counsel to</p> <p>21 support. Rio Tinto did not retain ARC for litigation</p> <p>22 but to provide investigative reports. Mr Kelly's</p> <p>23 conclusion in paragraph 61 is surmised and is wholly</p> <p>24 incorrect. ARC was asked to produce business</p> <p>25 intelligence for...(reading to the words)... for Rio</p> <p style="text-align: center;">Page 149</p>	<p>1 Livingstone was not told that it was investigating</p> <p>2 potential claims against Vale and at no point did it</p> <p>3 occur to Mr Huband that the sources of information might</p> <p>4 be potential trial witnesses. On no occasion has</p> <p>5 Livingstone been asked to produce the trial</p> <p>6 witnesses...(reading to the words)... Nonetheless,</p> <p>7 clients, including Rio Tinto, pay the fees, confirming</p> <p>8 that the work was --"</p> <p>9 We don't know what Rio Tinto has told the American</p> <p>10 court. In his evidence, Mr Kelly merely points out that</p> <p>11 litigation support is something which my clients offer</p> <p>12 in certain circumstances and the evidence before this</p> <p>13 court is that this was not one of those circumstances.</p> <p>14 Now my Lady, had it been, we would doubtless be</p> <p>15 having arguments of privilege which had been raised.</p> <p>16 None of those have been raised because it's not that</p> <p>17 type of case.</p> <p>18 As far as Mr Humphrey is concerned, there is no</p> <p>19 evidence any differently with regard to Begbies, with</p> <p>20 obviously, the caveat there that Mr Humphrey makes clear</p> <p>21 he's not the person who knows anything about anything,</p> <p>22 as it were. That may be something Mr Brown and</p> <p>23 Mr Leighton can assist with.</p> <p>24 So, my Lady, in my submission this is clearly not</p> <p>25 a litigation support place and in those circumstances,</p> <p style="text-align: center;">Page 151</p>
<p>1 Tinto, not to gather evidence for use in litigation</p> <p>2 which is a distinct activity."</p> <p>3 MRS JUSTICE ANDREWS: So, basically, what Rio Tinto is</p> <p>4 telling the court in the US is mistaken or is incorrect?</p> <p>5 MR GEORGE: If it's what my learned friend says they have</p> <p>6 said to the US court, it is incorrect. We have not</p> <p>7 presently identified precisely what passage is being</p> <p>8 relied upon.</p> <p>9 MS COCKERILL: If I may just interject. That is, of course,</p> <p>10 the position of ARC, who are the people who have the</p> <p>11 confidentiality provision in their contract. I am not</p> <p>12 sure what the position is of the other investigative</p> <p>13 firms. I think Mr Humphrey may have dealt with it but</p> <p>14 I am not sure about ...</p> <p>15 MR GEORGE: Could I invite you to find Mr Parkhouse's second</p> <p>16 witness statement, paragraph 10:</p> <p>17 "At several points in his statement, Mr Kelly</p> <p>18 ...(Reading to the words)... that is speculative and</p> <p>19 I am told by Mr Huband, wrong. In particular,</p> <p>20 paragraph 55, based on a statement by Rio Tinto, Mr</p> <p>21 Kelly expressly makes an assumption that Livingstone</p> <p>22 would have known that any sources of ...(reading to the</p> <p>23 words)... At paragraph 60, he asserts that absent this</p> <p>24 aspect, the work we did would be of no value to Rio</p> <p>25 Tinto. Mr Huband informs me that it is all incorrect,</p> <p style="text-align: center;">Page 150</p>	<p>1 that provides no support for a basis that there was a no</p> <p>2 confidentiality between Rio Tinto and my clients.</p> <p>3 We have debated clause 16.1. My submission is that</p> <p>4 whatever else it may provide, it does not allow a demand</p> <p>5 for the provision of the identity of the sources of</p> <p>6 information which is the only issue before this court.</p> <p>7 But my Lady has the point, even if I was wrong about all</p> <p>8 of that, that is not the determining factor here because</p> <p>9 the express promises of confidentiality made by my</p> <p>10 clients to the associates and sources are not taken away</p> <p>11 or abrogated by matters of which they were unaware,</p> <p>12 namely these other contracts.</p> <p>13 My Lady, the only --</p> <p>14 MRS JUSTICE ANDREWS: Help me on this. It seems to me that</p> <p>15 Ms Cockerill has made a point about the quality of the</p> <p>16 evidence, and it is in many respects somewhat vague in</p> <p>17 relation to the threats that the individuals face,</p> <p>18 particular individuals face.</p> <p>19 It seems to me that if one was dealing with</p> <p>20 information that was absolutely critical and germane to</p> <p>21 the heart of a case, that one might then want to --</p> <p>22 where it was plainly relevant and ought to be disclosed,</p> <p>23 then when one is balancing public policy interest in</p> <p>24 keeping information confidential against that sort of</p> <p>25 critical information, say the bankers' situation, that</p> <p style="text-align: center;">Page 152</p>



<p>1 one would really need very strong and cogent evidence to</p> <p>2 stop somebody getting hold of the critical information,</p> <p>3 simply on the basis that it was confidential or</p> <p>4 provision of the information might expose an individual</p> <p>5 to risk of one kind or another.</p> <p>6 Where one is dealing with article 8, article 2,</p> <p>7 article 3-type points, one would then need to descend</p> <p>8 into the sort of particulars one is familiar with in the</p> <p>9 administrative court in relation to country guidance and</p> <p>10 so forth, explaining precisely what the risks are that</p> <p>11 individuals face on the ground in a particular country.</p> <p>12 But if one is dealing with information that is of</p> <p>13 remote, if any, relevance to the issues, then does that</p> <p>14 have a bearing on the quality of the information that's</p> <p>15 provided on the other end of the scale?</p> <p>16 MR GEORGE: My Lady, in my submission yes of course it does,</p> <p>17 and indeed it is absolutely intrinsic to the balancing</p> <p>18 exercise that this court is carrying out. I know that</p> <p>19 that expression has been deprecated to the judicial</p> <p>20 discretion, but nonetheless you are considering two</p> <p>21 competing factors.</p> <p>22 My Lady, in a sense a starting point could be what</p> <p>23 is the relevance of this information. After all, that</p> <p>24 is the Nasse formulation --</p> <p>25 MRS JUSTICE ANDREWS: It seemed to me that that is the</p> <p style="text-align: center;">Page 153</p>	<p>1 will be useful for my Lady to see the whole hearing, but</p> <p>2 the American judge, as my Lady has already seen from the</p> <p>3 brief exercise, it's quite clear that the English Senior</p> <p>4 Master, who obviously had some familiarity from previous</p> <p>5 cases, would be considering this and that it may well</p> <p>6 not pass muster with him. So there's no question about</p> <p>7 trespassing.</p> <p>8 This exercise on redactions to confidentiality is</p> <p>9 very, very different to striking out whole classes of</p> <p>10 documents or effectively rewriting them.</p> <p>11 MRS JUSTICE ANDREWS: Well you don't, you cannot rewrite</p> <p>12 MR GEORGE: Precisely, so you can just strike out. So the</p> <p>13 consideration involves looking at the specific relevance</p> <p>14 of the redacted information, which is here the identity</p> <p>15 of the sources versus the evidence which my Lady has in</p> <p>16 each case as to the interests that require to be</p> <p>17 protected, be it confidentiality, risk of recrimination.</p> <p>18 MRS JUSTICE ANDREWS: It's a potential prejudice, isn't it,</p> <p>19 on both sides.</p> <p>20 MR GEORGE: Precisely.</p> <p>21 MRS JUSTICE ANDREWS: What is going to happen if the</p> <p>22 information is handed out at a risk that is flagged up</p> <p>23 in the evidence eventuates, balance that against what</p> <p>24 harm is it going to do to the party that's seeking the</p> <p>25 information if they don't have it.</p> <p style="text-align: center;">Page 155</p>
<p>1 starting point. You don't start with the</p> <p>2 confidentiality, you start with the relevance. Do they</p> <p>3 need this information at all? Why do they need it?</p> <p>4 What does it go to? Where is it going to get them to</p> <p>5 find it out? Leave aside from that the fact that they</p> <p>6 obviously want it, you can see why they would want it,</p> <p>7 commercially and as a matter of litigation tactics, but</p> <p>8 that's a separate point.</p> <p>9 But I am still grappling with relevance here and</p> <p>10 I don't think it's an answer to it to say, "Well that's</p> <p>11 all water under the bridge, it's all part and parcel of</p> <p>12 the letter of request and the New York judge obviously</p> <p>13 thought it was relevant or he wouldn't have made the</p> <p>14 order in the terms in which he did". I think, with</p> <p>15 respect, that's putting too fine a gloss on it.</p> <p>16 MR GEORGE: That would be the position if I was inviting</p> <p>17 my Lady to strike out whole categories of documents for</p> <p>18 this reason, because that would be effectively to</p> <p>19 second-guess that exercise in America. I am not</p> <p>20 objecting to the class of documents in principle. I'm</p> <p>21 seeking to protect the very narrow piece of information</p> <p>22 within that.</p> <p>23 In those circumstances, you are in no way revisiting</p> <p>24 anything that the American court has done, and indeed --</p> <p>25 I will hand up the transcript before I finish because it</p> <p style="text-align: center;">Page 154</p>	<p>1 MR GEORGE: Precisely.</p> <p>2 MRS JUSTICE ANDREWS: At the moment, I am bound to say that</p> <p>3 I am having a little difficulty in understanding why</p> <p>4 this information is so crucial, to anything.</p> <p>5 MR GEORGE: My Lady, in my submission it's fair to</p> <p>6 characterise the debate as I say it is irrelevant, for</p> <p>7 reasons I have given. My Lady friend -- I heard what my</p> <p>8 learned friend said before lunch. I still do not</p> <p>9 understand why much of the evidence is going to be</p> <p>10 relevant, but if she is right it will be of the most</p> <p>11 marginal and tangential hypothetical relevance on, well,</p> <p>12 if they'd asked, which they didn't, and if we'd agreed</p> <p>13 to do it, which we wouldn't have, would they have known</p> <p>14 from the identity of the sources something extra from</p> <p>15 what they'd have known about the underlying documents</p> <p>16 they're going to get anyway.</p> <p>17 MRS JUSTICE ANDREWS: Putting the case at its highest,</p> <p>18 it's: if Rio Tinto had exercised its powers to compel --</p> <p>19 for the purposes of the argument we assume they've</p> <p>20 got -- to compel the business entities to reveal this</p> <p>21 information to them, would it have put them in a</p> <p>22 position where they should have commenced proceedings</p> <p>23 much sooner?</p> <p>24 MR GEORGE: Yes.</p> <p>25 MRS JUSTICE ANDREWS: That's what it comes down to.</p> <p style="text-align: center;">Page 156</p>

<p>1 MR GEORGE: And it is almost impossible to see how the 2 identity of the source is going to affect that 3 evaluation by the American court.</p> <p>4 MRS JUSTICE ANDREWS: On the one hand, you might say it 5 might have affected Rio Tinto's evaluation, but the 6 problem is there's already been a value judgment applied 7 to that information by your clients. If that's going to 8 be attributed to Rio Tinto, whether they knew it or not, 9 then you don't need to know who the source is because 10 you have done the thinking for them.</p> <p>11 MR GEORGE: Precisely. I have heard what my Lady has said 12 about the timing point, but in this particular context 13 the timing point is important because there is no basis 14 on the evidence that's been put forward, the idea that 15 you have to move as soon as possible --</p> <p>16 MRS JUSTICE ANDREWS: I didn't follow that point.</p> <p>17 MR GEORGE: Precisely, my Lady. Leaving aside that, on this 18 analysis it clearly is relevant whether this exercise we 19 are now hypothesising, they would have asked, we would 20 have told them, they would have learnt X or Y, took 21 place within the primary limitation period.</p> <p>22 Because if it did, and subject to that point which 23 we are parking for the moment, it is irrelevant, because 24 of the timing point. That's not revisiting anything or 25 contradicting anything the American court have said in</p> <p style="text-align: center;">Page 157</p>	<p>1 or create other recriminations. It is only if you 2 cannot dispose fairly or justly of the case otherwise, 3 and in my submission that requires -- and my Lady is 4 obviously right, that if it was critical, and the 5 English authorities in the bundle demonstrate, that 6 obviously was of critical importance, there is going to 7 be a very finely judged balancing exercise to be carried 8 out.</p> <p>9 Where one simply cannot see the relevance at all, 10 and it's marginal and tenuous at best, there is, in my 11 submission, very little evidence that is required to get 12 over the relevant threshold. I entirely hear what 13 my Lady says in relation to the evidence, and partly 14 obviously that's why I've prepared a schedule, so 15 my Lady can weigh it in toto rather than scurrying 16 around throughout the witness statements, but 17 cumulatively in my submission.</p> <p>18 My learned friend is quite wrong to suggest that 19 I have stood up and said it's her burden of proof and 20 that's that. We have adduced --</p> <p>21 MRS JUSTICE ANDREWS: No, you have accepted it is your 22 burden of proof.</p> <p>23 MR GEORGE: Quite. I have adduced evidence to try and meet 24 it. And that evidence establishes, as I have said, some 25 of the submissions that are made are not correct. We</p> <p style="text-align: center;">Page 159</p>
<p>1 the letter of request about what may be a prima facie -- 2 it's identifying the weight of the relevance, but 3 effectively one can assess it at zero for these purposes 4 because all of that exercise within the limitation 5 period simply cannot take anybody anywhere.</p> <p>6 MRS JUSTICE ANDREWS: Well I can see that information after 7 the event might be the foundation for an argument where 8 you were able to get this with ease in 2010; you could 9 have got it equally easily in 2008 if you'd actually 10 asked the question. That I can see.</p> <p>11 MR GEORGE: In my submission, you don't need the identity of 12 the source from that.</p> <p>13 MRS JUSTICE ANDREWS: No, you don't.</p> <p>14 MR GEORGE: You can just make the submission, "You retained 15 Livingstone in 2010. Why didn't you retain them in 16 2008?" I mean, that's how the submissions can be put 17 and I am not -- I have no axe to grind otherwise, 18 whether that's a good point or a bad point, but you do 19 not need to know the identity of the source in order to 20 make it, in my submission.</p> <p>21 MRS JUSTICE ANDREWS: It's food for thought anyway.</p> <p>22 MR GEORGE: My Lady, we respectfully wholeheartedly endorse 23 the proposition, which is entirely consistent with 24 Nasse, that one starts by looking at relevance -- it is 25 only a last resort that one would breach confidentiality</p> <p style="text-align: center;">Page 158</p>	<p>1 have expressed evidence as to the assurances given to 2 each of the associates and sources, express evidence 3 that this was not litigation support, and I won't read 4 out the other bits of the schedule because my Lady has 5 it and my Lady will consider it.</p> <p>6 It's obviously perfectly proper to make submissions 7 about the evidence, but this is not a burden of proof 8 case. I have put forward my evidence and in my 9 respectful submission --</p> <p>10 MRS JUSTICE ANDREWS: You say it's enough, Ms Cockerill says 11 it isn't, that you should have descended to more 12 specificity and I have to make my mind up.</p> <p>13 MR GEORGE: Precisely. On the other hand of that, I say, 14 when one looks at relevance, it is, with respect, my 15 respectful submission that our evidence is an awful lot 16 more impressive than the explanations that have been put 17 forward by the American lawyers through my learned 18 friend, who I appreciate has only passed on what she has 19 been told about New York law, as to why anyone considers 20 these are going to be of relevance to disposing fairly 21 of the case, as opposed to an obvious litigation tactic 22 pressure point in incredibly highly well-resourced and 23 fought litigation, that is obviously of the nature we 24 are all familiar with that's taking place in the United 25 States.</p> <p style="text-align: center;">Page 160</p>

<p>1 In my submission, when one looks at it very clearly, 2 the relevance versus the prejudice, putting all of the 3 categories of potential prejudice under that heading, it 4 is quite clear that very limited redactions that 5 I invite the court to make are appropriate.</p> <p>6 MRS JUSTICE ANDREWS: Before you sit down, there's 7 a question of Mr Humphrey.</p> <p>8 I think that we've got to Mr Humphrey saying he's 9 got no relevant evidence to give in relation to the 10 material in the documents, the information in the 11 documents themselves, and I think you've got 12 a concession that they can't go on a sort of 13 Westinghouse expedition with him.</p> <p>14 Why should he not in the normal way answer to the 15 subpoena duces tecum so as to be able to (A) answer 16 questions in relation to the searches that have been 17 carried out, given that this procedure doesn't actually 18 allow for a witness statement instead of somebody 19 turning up and (B) to provide evidence in answer to 20 questions about the destruction of the documents.</p> <p>21 In particular, I'm interested to know what you have 22 to say about Ms Cockerill's point that he was in the 23 position that he's now in at the time when these 24 documents were destroyed on the instructions of Rio 25 Tinto.</p> <p style="text-align: center;">Page 161</p>	<p>1 place now, or in the next 28 days before the order 2 requires to be complied with, to be conducted on the 3 basis of agreements and negotiations between the 4 parties. That is perfectly sensible.</p> <p>5 Having Mr Humphrey turn up and answer questions 6 about them isn't going to take anyone any further.</p> <p>7 Secondly, as to the destruction point, you have the 8 evidence of Mr Humphrey, I showed it to you earlier. 9 Yes, you can probably say, "That happened on your 10 watch". I mean, he clearly didn't know about it, that's 11 implicit from what he said when Mr Brown and Mr Leighton 12 told him. Yes, "If that must be said, this is most 13 unsatisfactory, isn't it, what Mr Brown and Mr Leighton 14 did", and he may well agree, he may well have something 15 to say. That won't take the litigation position any 16 further forward for anyone. What will take the position 17 forward, potentially, is Mr Brown and Mr Leighton coming 18 to court and asking questions about what they did and 19 why they did it in breach of company policy, if that's 20 the position.</p> <p>21 So, in my submission, this is disproportionate and, 22 the use of effective case management, the court should 23 order whether a proper report be compiled of the 24 searches, particularly of a nil return if it's going to 25 be provided, but that there is nothing that Mr Humphrey</p> <p style="text-align: center;">Page 163</p>
<p>1 MR GEORGE: My Lady, two submissions in relation to that. 2 In the modern age of the -- and we are all familiar 3 with the way civil procedure works and we are not 4 seeking to deny anyone an opportunity; it's simply 5 a question of a pointless exercise, in our submission, 6 in fact for both sides.</p> <p>7 As far as the searches are concerned, Mr Humphrey, 8 we have said, will obviously -- he's provided a witness 9 statement already explaining previous searches. There 10 will obviously be one provided as to the further ones 11 that have been carried out.</p> <p>12 If there are questions about that, in a sense the 13 better way is for these -- exchange of correspondence so 14 further searches can be carried out, if appropriate. To 15 have this done orally is unlikely to produce anything 16 useful beyond -- it may not even be within the power to 17 have further searches carried out, you will just end up 18 with some evidence that these were not very satisfactory 19 searches. That sort of thing will be handled in 20 advance.</p> <p>21 So in a sense we are not going to get better 22 searches out of having Mr Humphrey turn up and sit there 23 and be criticised, that evidence will be of no use at 24 all.</p> <p>25 What's relevant is for the searches that are to take</p> <p style="text-align: center;">Page 162</p>	<p>1 can usefully assist the court with.</p> <p>2 My Lady, finally one asks -- we see the point of the 3 hostile witnesses, and we are not going to object to the 4 power being exercised.</p> <p>5 My instructions are we would consider it 6 appropriate, particularly as I understand from my 7 learned friend this is a normal course, that an officer 8 who has been trained and has experience in using that 9 power of hostile witness, which certainly as 10 a practitioner one simply doesn't and wouldn't be 11 appointed, and so we would ask for the Master --</p> <p style="text-align: center;">Discussion</p> <p>13 MRS JUSTICE ANDREWS: An order that a Master do it. Would 14 you be content with that, Ms Cockerill?</p> <p>15 MS COCKERILL: I would be very content, my Lady, if it's 16 possible to get a Master.</p> <p>17 MRS JUSTICE ANDREWS: I can vary the order to provide that 18 the examination be carried out before a Master instead.</p> <p>19 I am going to direct that Mr Humphrey should turn 20 up, but I make it very clear, Ms Cockerill, the ambit of 21 any questions that are to be asked of him are strictly 22 in relation to his role as the producer of the 23 documents, and that will extend to asking him any 24 questions about how they came to be destroyed, insofar 25 as you get anything of any value out of him. I suspect</p> <p style="text-align: center;">Page 164</p>

<p>1 you won't get very much, but I don't think I can</p> <p>2 properly stop you calling for him to produce it, given</p> <p>3 that that's the normal procedure.</p> <p>4 Of course, if he turns up and has nothing of any</p> <p>5 value to say, there may be cost consequences.</p> <p>6 MR GEORGE: Yes, and the costs will be paid anyway because</p> <p>7 that's part of the order --</p> <p>8 MRS JUSTICE ANDREWS: In which case, they do it at their own</p> <p>9 risk.</p> <p>10 MR GEORGE: Precisely. This, obviously, is an inter partes</p> <p>11 application, but the normal compliance of the order is</p> <p>12 that it would be at the expense of the applicants.</p> <p>13 MRS JUSTICE ANDREWS: All more reason then why I shouldn't</p> <p>14 shut out Vale from having at least the opportunity to</p> <p>15 ask him that. But I am putting down the very clear</p> <p>16 marker: there's not going to be any type of British</p> <p>17 Westinghouse type questions being asked of him, and that</p> <p>18 ought to be reflected, I think, in the order when it's</p> <p>19 finally drawn up.</p> <p>20 MR GEORGE: Yes, my Lady.</p> <p>21 Two final things. I have said three times now, I</p> <p>22 think, I will hand up the full transcript of the</p> <p>23 American proceedings. My team are getting concerned</p> <p>24 I will leave without doing it (Handed).</p> <p>25 MRS JUSTICE ANDREWS: Thank you very much.</p> <p style="text-align: center;">Page 165</p>	<p>1 That will save both of you time because if I have the</p> <p>2 template of the order, we can then just incorporate</p> <p>3 whatever I decide about the redactions and then it can</p> <p>4 be signed off and handed to you through the associate</p> <p>5 straight away on Monday and that will save time.</p> <p>6 MR GEORGE: If we put alternative proposals, insofar as</p> <p>7 there are outstanding disputes, it would be relatively</p> <p>8 easy for my Lady to say yay or nay.</p> <p>9 MRS JUSTICE ANDREWS: Yes, I'll go for this or no for that.</p> <p>10 That would be terribly helpful if you both have the time</p> <p>11 to do it, and I appreciate the offer thank you.</p> <p>12 MS COCKERILL: We will see what we can achieve, my Lady</p> <p>13 MRS JUSTICE ANDREWS: Thank you very much.</p> <p>14 (3.42 pm)</p> <p>15 (The hearing concluded)</p> <p>16</p> <p>Housekeeping .....1</p> <p>17</p> <p>Submissions by MR GEORGE .....3</p> <p>18</p> <p>Submissions by MS COCKERILL .....8</p> <p>19</p> <p>Submissions by MR GEORGE .....19</p> <p>20</p> <p>Submissions by MS COCKERILL .....24</p> <p>21</p> <p>Submissions by MR GEORGE .....26</p> <p>22</p> <p>Submissions by MS COCKERILL .....74</p> <p>23</p> <p>Submissions by MR GEORGE .....75</p> <p>24</p> <p>Submissions by MS COCKERILL .....79</p> <p>25</p> <p style="text-align: center;">Page 167</p>
<p>1 MR GEORGE: I do not think this is controversial: one of the</p> <p>2 orders we seek will need a formal extension for</p> <p>3 compliance with the order, in whatever form my Lady</p> <p>4 finally orders, and then obviously we will comply with</p> <p>5 that.</p> <p>6 MRS JUSTICE ANDREWS: All necessary extensions in principle</p> <p>7 will be granted. I hope the parties can come to</p> <p>8 reasonable accommodation in terms of timescale.</p> <p>9 MR GEORGE: I am grateful, my Lady.</p> <p>10 MRS JUSTICE ANDREWS: Obviously there's no point making an</p> <p>11 order saying that you must comply with it if you cannot</p> <p>12 comply with it or the timescale has already gone.</p> <p>13 Thank you both very much indeed.</p> <p>14 I will reserve judgment. I think it is likely to be</p> <p>15 Monday morning.</p> <p>16 I will do my level best to get you something to look</p> <p>17 at in advance, I cannot promise it, but I will try very</p> <p>18 hard to get you something by close of business tomorrow.</p> <p>19 MR GEORGE: I am grateful.</p> <p>20 MS COCKERILL: My Lady, if we make any progress agreeing the</p> <p>21 specificity matters, is it worth communicating with your</p> <p>22 clerk for you to incorporate it or shall we just leave</p> <p>23 it for Monday?</p> <p>24 MRS JUSTICE ANDREWS: It would be helpful to have a draft</p> <p>25 order in advance, if you can manage to get that far.</p> <p style="text-align: center;">Page 166</p>	<p>1</p> <p>Submissions by MS COCKERILL .....88</p> <p>2</p> <p>Submissions by MR GEORGE .....149</p> <p>3</p> <p>Discussion .....164</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p style="text-align: center;">Page 168</p>

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